192

744458
Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, PETITIONER,

vs.

GERDA ECKERT AND THOR ECKERT, JR., PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF THOR ECKERT & CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 18, 1946.

CERTIORARI GRANTED NOVEMBER 12, 1946.

INDEX

Record on appeal to Court of Appeals of New York	3
Notice of appeal to the Court of Appeals	3
Order of reversal by Appellate Division on appeal from judgment appealed from	5
Judgment of reversal and dismissal appealed from	7
Opinion of the Appellate Division, Peck, J.	9
Stipulation as to printing of exhibits	15
Waiver of certification (Court of Appeals)	16
Order of Court of Appeals as to printed record	17
Case on appeal to Appellate Division	19
Index to case on appeal	20
Notice of appeal to Court of Appeals from Resettled order	399
Order of Appellate Division on motion for resettlement, appealed from	401
Waiver of certification (Court of Appeals)	405
Opinion of Court of Appeals, Desmond, J.	409
Remittitur of Court of Appeals	412
Order on remittitur of Court of Appeals	414
Judgment on remittitur of Court of Appeals	415
Clerk's certificate	417
Order allowing certiorari	418

Notice of Appeal to the Court of Appeals

Court of Appeals

OF THE STATE OF NEW YORK

PETER CALDAROLA,
Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co.,
Defendants-Respondents.

Sirs:

PLEASE TAKE NOTICE that the plaintiff Peter Caldarola hereby appeals to the Court of Appeals of the State of New York from an order entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on the 5th day of April, 1946 where by the terms of the said order the Appellate Division ordered and adjudged that the judgment in favor of the plaintiff and against the defendants above named be in all things reversed upon

questions of law with costs to the defendants, and plaintiff's complaint dismissed with costs. Plaintiff, Peter Caldarola, also appeals from the judgment entered in the office of the clerk of the County of New York on the 9th day of April, 1946, which was in favor of the defendants Gerda Eckert and Thor Eckert, Jr. and against the plaintiff in the sum of $866.95. Plaintiff appeals from each and every part of
5 the said order and each and every part of the said judgment as well as from the whole thereof.

Dated: New York, April 10, 1946.

Yours, etc.,

ABRAHAM M. FISCH,
Attorney for Plaintiff,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
6 City of New York.

To:

KIRLIN, CAMPBELL, HICKOX & KEATING, ESQS.,
Attorneys for Defendants-Respondents,
120 Broadway,
New York City.

COUNTY CLERK OF THE COUNTY OF NEW YORK.

7

Order of Reversal on Appeal from Judgment Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of April, 1946.

8

Present:

HON. FRANCIS MARTIN,
Presiding Justice,
" ALFRED H. TOWNLEY,
" EDWARD J. GLENNON,
" JOSEPH M. CALLAHAN,
" DAVID W. PECK,
Justices.

16337

PETER CALDAROLA,
Respondent.

—against—

MOORE-McCORMACK LINES, INC., impleaded with GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Appellants.

9

An appeal having been taken to this Court

Order of Reversal on Appeal from Judgment Appealed From

by the defendants Gerda Eckert and Thor Eckert, Jr., partners, etc., from the judgment of the Supreme Court, New York County, entered on the 13th day of June, 1945, and said appeal having been argued by Mr. Raymond Parmer of counsel for the appellants, and by Mr. Abraham M. Fisch, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, reversed upon the questions of law with costs to the appellants, and the complaint dismissed with costs. (Two of the Justices dissent and vote to affirm.)

Enter,

F. M.

13

Judgment of Reversal and Dismissal Appealed From

SUPREME COURT

NEW YORK COUNTY

8618—1944

14

PETER CALDAROLA,
Plaintiff,

—*against*—

MOORE-McCORMACK LINES, INC., impleaded with GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defendants.

15

Defendants Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co. having appealed to the Appellate Division of the Supreme Court for the First Judicial Department from the judgment entered in the office of the Clerk of the County of New York on June 13, 1945, which directed that the plaintiff, Peter Caldarola, recover of the defendants, Gerda Eckert and Thor Eckert, Jr., doing business under the firm name of Thor Eckert & Co., the total sum of $12,191.10, and the said Appellate Division

16 *Judgment of Reversal and Dismissal Appealed From*

having made and filed its order dated April 5, 1946 wherein it was ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of law, with costs to the appellants, and the complaint dismissed with costs, two of the Justices dissenting and voting to affirm, and a certified copy of said order of the Appellate Division, together with the record in
17 said Appellate Division, having been filed in the office of the Clerk of the County of New York, it is

ADJUDGED that the judgment so appealed from be and is hereby reversed, and it is further

ADJUDGED that the complaint herein be and is hereby dismissed, and that defendants Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., of 19 Rector Street, Borough of Man-
18 hattan, City of New York, recover of Peter Caldarola, plaintiff, of 1050—67th Street, Borough of Brooklyn, City of New York, the sum of $866.95, costs as taxed, and that said defendants have execution therefor.

Judgment signed this 9th day of April, 1946.

ARCHIBALD R. WATSON,
Clerk.

19

Opinion of the Appellate Division

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

March, 1946

FRANCIS MARTIN, *P.J.*,
ALFRED H. TOWNLEY,
EDWARD J. GLENNON, 20
JOSEPH M. CALLAHAN,
DAVID W. PECK, *JJ.*

16337

PETER CALDAROLA,
Respondent,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant, 21

impleaded with

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defendants-Appellants.

Appeal from a judgment of the Supreme Court, New York County, entered on a verdict in favor of plaintiff.

22 *Opinion of the Appellate Division.*

RAYMOND PARMER, of Counsel (Vernon Sims Jones with him on the brief; KIRLIN, CAMPBELL, HICKOX & KEATING, attorneys) for defendants-appellants.

ABRAHAM M. FISCH, of counsel (Sidney Schiffman with him on the brief) for respondent.

—•—

PECK, *J.*:

23 Plaintiff, a longshoreman, while engaged in unloading cargo, was injured by the fall of a defective boom on the steamship "Everagra". The vessel was owned by the United States. Defendants-appellants had a contract with the United States, designated as a general agency contract, whereby they were appointed "agent to manage and conduct the business of vessels" assigned to them by the United States, including the "Everagra".

24 The contract provides that defendants-appellants are to conduct the business in accordance with directions, orders and regulations issued by the United States. The "business" includes the vessels' trade, collecting and accounting therefor, equipping, victualing, supplying and maintaining the vessels, inspecting and advising the United States with respect to the state of repair and condition of the vessels, and arranging for their repair.

As to operation of the vessels, the contract provides that defendants-appellants shall procure a Master who "shall be an agent and em-

ployee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel"; that they "shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel", the officers and members of the crew to be subject only to the orders of the Master.

The regulations of the War Shipping Administration, to which defendants-appellants' conduct of the business was subject, provide that they shall "determine the repairs necessary", and arrange for and order the performance of required repairs, with or without prior approval of the Repair Division of the War Shipping Administration, depending on whether the expenditure shall exceed $10,000.

Plaintiff might, of course, proceed against the United States in the Federal Court in Admiralty, where he would not be entitled to a jury trial, but brought this action against the agents in the State Court, where he could have a jury trial, on the theory that they were negligent in not repairing the defective boom and that such negligence gives rise to a cause of action in plaintiff's favor. Concededly, they had not supplied the boom and their alleged negligence was failure to repair the boom. Defendants-appellants contend that any failure on their part to repair the boom was only a breach of contract as to the United States and was not actionable negligence as to plaintiff.

Plaintiff agrees, preforce, with defendants-appellants' major premise that he may not avail himself of their breach of contract with the United States, but must bottom his cause of action on a showing of their control of the instrumentality causing the injury (*Cullings* v. *Goetz*, 256 N. Y. 287). The question, therefore, is whether they had such control of the boom as to incur responsibility to one in plaintiff's position for the condition of the boom.

29 Defendants-appellants were not vested with management or operation of the ship. Their contract with the United States makes it clear that their functions related to the ship's "business" as distinguished from its physical operation. They were not in control of the ship itself. That was vested in the Master as the agent of the United States and not as agent of defendants-appellants. They had no control over the use or operation of the ship machinery, such as the boom on the occasion of this 30 injury. They had access to the ship and had a contractual duty to the United States of inspecting and determining the necessity for repairs and arranging for the making of repairs.

Plaintiff regards defendants-appellants' access to the ship and their authority to order repairs as sufficient control to imply a responsibility for the condition of the ship to persons on the ship in connection with the ship's business. We cannot so regard it. The defendants-appellants did not in fact have control of the ship or its machinery, and the opportunity and duty which

they had to order repairs were contractual only and related only to the United States. They are not the equivalent of control or a substitute for control in relation to the public.

The defendants-appellants had not supplied the boom nor done anything to render it defective. Their failure to observe its condition and order its repair was strictly non-feasance. The distinction between misfeasance and non-feasance may be unimportant related to one in 32
control of property who has a responsibility, arising out of control, for the condition of the property, and whose failure to repair a dangerous condition may be regarded as negligent operation of the property and as actionable as his creation of the condition. Not so of one not in control and not having the public responsibility for the condition of the property. Nonfeasance on his part is not actionable except as to one to whom he has incurred an obligation of action.

The principal legal authority advanced by 33
plaintiff in support of his position is *Brady* v. *Roosevelt S. S. Co.* (317 U. S. 575). The agency contract in that case was very different, however, requiring the agent to man and operate the vessel.

We are unable to tell from the reported decisions of the Appellate Division, Second Department, in *Pedersen* v. *Stockard Steamship Corp.* (268 App. Div. 992) and *Pipitone* v. *Standard Fruit & S. S. Co.* (New York Law Journal, p. 988, March 12, 1946) whether the alleged negligence of the agent in those cases consist-

ed of furnishing defective equipment or failing to repair defective equipment. Reading the two decisions together, however, we do not gather the impression that the Court meant to indicate a view that non-feasance of the agent, under the contract involved in the present case, would be actionable. The New York cases cited in the *Pipitone* opinion are *Mollino* v. *Ogden & Clarkson Corp.* (243 N. Y. 450) in which the agent had taken "sole and absolute
35 control" of the property, and *Moch Co.* v. *Rensselaer Water Co.* (247 N. Y. 160) where the Court held the defendant not liable for non-feasance, pointing to the distinction between launching an instrument of harm and failing to become an instrument for good.

Defendants-appellants' duty to repair here was a duty owing only to the United States and arising out of contract. Plaintiff cannot avail himself of the contract, and having failed to show that defendants-appellants had such control of
36 the ship or boom as to make them publicly responsible for the condition of the ship or boom, plaintiff has failed to establish that defendants-appellants were under any duty to plaintiff to repair the boom or that their failure to make the repair was any breach of duty owed to the plaintiff or gave rise to any cause of action in plaintiff's favor.

The judgment should be reversed with costs, and the complaint dismissed with costs.

Martin, *P.J.*, and Callahan, *J.*, concur.

Townley and Glennon, *JJ.*, dissent and vote to affirm.

37

Stipulation as to Printing of Exhibits

COURT OF APPEALS

OF THE STATE OF NEW YORK

PETER CALDAROLA,
Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

38

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co.,
Defendants-Respondents.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above entitled action that the exhibits which were not included in the printed record on appeal in the Appellate Division but used during the argument by counsel shall again be omitted from the printed record on appeal with leave to either counsel to submit same to the Court of Appeals at the time of the argument. 39

Dated: New York, N. Y., April 24th, 1946.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Appellant.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Respondents.

40

Waiver of Certification

(Court of Appeals)

Pursuant to Section 170 of the Civil Practice Act,

It is hereby stipulated that the foregoing consists of true and correct copies of the Record on Appeal as filed with the Clerk of the Appellate Division, First Department; the Notice
41 of Appeal to the Court of Appeals, the Order of Reversal on Appeal from Judgment Appealed From, the Judgment of Reversal and Dismissal Appealed From and the Opinion of the Appellate Division, all of which are now on file in the Office of the Clerk of the County of New York.

Certification of all the foregoing papers is hereby waived.

Dated: New York, N. Y., April 24th, 1946.

Abraham M. Fisch,
42 *Attorney for Plaintiff-Appellant.*

Kirlin, Campbell, Hickox & Keating,
Attorneys for Defendants-Respondents.

43

Order Granting Leave to Prosecute Appeal on Seven Copies of Appellate Division Record

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eighteenth day of April, A. D. 1946. 44

Present:

HON. JOHN T. LOUGHRAN,
Chief Judge, presiding.

PETER CALDAROLA,
Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant, 45

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Respondents.

A motion having heretofore been made herein upon the part of the appellant for leave to prosecute his appeal on seven copies of record in Appellate Division, papers having been

46 *Order Granting Leave to Prosecute Appeal on Seven Copies of Appellate Division Record*

submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

A Copy

47 RAYMOND J. CANNON,
Deputy Clerk.

(SEAL)

48

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PETER CALDAROLA,

Plaintiff-Respondent,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants-Appellants.

CASE ON APPEAL

KIRLIN CAMPBELL HICKOX & KEATING,
Attorneys for Defendants-Appellants,
120 Broadway,
New York City.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Respondent,
225 Broadway,
New York City.

INDEX

	PAGE
Statement Under Rule 234	1
Notice of Appeal	2
Summons	4
Complaint	5
Answer	11
Judgment Appealed From	15
Extract From Clerk's Minutes	16
Case and Exceptions	17
Opening Statements	18
Motion to Dismiss	93, 296
Summation	298
Charge to the Jury	299
Plaintiff's Request to Charge	328
Defendants' Requests to Charge	330
Verdict	335
Motion to Set Aside Verdict—Denied	336
Statement that Case Contains All the Evidence	366
Stipulation as to Exhibits	367
Affidavit of No Opinion	369
Stipulation Settling Case	370

PAGE

Order Settling Case 370

Stipulation Waiving Certification 371

Order Filing Record in Appellate Division .. 371

Witnesses for Plaintiff:

Peter Caldarola—Plaintiff
Direct 20
Cross 27
Recalled
Cross 75
Redirect 81

Vincent Russo
Direct 46
Cross 55
Recalled—Rebuttal
Direct 245
Cross 246

Joseph R. Russo
Direct 63
Cross 67
Recalled—Rebuttal
Direct 248
Cross 251
Redirect 252

Harold Winsch
Direct 106

Harris Levy
Direct 109

Raymond Parmer
Direct 110

PAGE

Daniel Carney
Rebuttal
Direct 253
Cross 259

Charles W. Steuerwald
Rebuttal
Direct 278
Cross 281

Witnesses for Defendants:

Sergejs Bols
Direct 72

Resumed—Direct 82, 116
Cross 126
Redirect 139, 158

Harold Winsch
Recalled
Direct 114

Harry A. Peterson
Direct 143
Cross 152

Waldemar Volkovic
Direct 159

Janis Orava
Direct 164
Cross 171
Redirect 179
Recross 180

PAGE

Bruno J. Augenti
Direct 183
Cross 189

Vladislaus V. Belochvoscicks
Direct 192
Cross 199

Marcus E. Rough
Direct 202
Cross 230
Redirect 233

Nicholas J. Poliknick
Direct 234

John O'Rourke
Direct 236
Cross 237
Redirect 238

Andrew S. Varni
Direct 239
Cross 241
Redirect 243

PLAINTIFF'S EXHIBITS:

1. Agreement made as of March 1, 1943 between the War Shipping Administration and Thor Eckert and Company (received in evidence at fol. 56) 337

2, 3, 4 and 5. Medical Exhibits (received in evidence at fol. 239) 357

PAGE

6. Collection of orders and regulations of the War Shipping Administration (received in evidence at fol. 324) .....

7. Book containing compilation of certain standard contract forms of War Shipping Administration (received in evidence at fol. 328) .....

8. Maintenance and Repair Regulations No. 1 (Revised) dated August 20, 1942 (received in evidence at fol. 341) 358

DEFENDANTS' EXHIBITS:

A, B, C and D. Photographs (received in evidence at fols. 101, 105, 114, 177) .....

E. Model of ship (received in evidence at fol. 228) .....

F. Photograph (received in evidence at fol. 271) 364

G, H, I and J. Medical exhibits (received in evidence at fol. 278) .....

K-1, K-2 and K-3. Pieces of wood (received in evidence at fols. 353, 475) .....

L. Certificate (received in evidence at fol. 368) .....

M. Maintenance and Repair Regulation (revision of Dec. 15, 1944, effective Jan. 15, 1945) (received in evidence at fol. 420) . 365

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* Omitted pursuant to stipulation.

PAGE

N, O, P and Q. Photographs (received in evidence at fol. 552) ..... *

R and S. Envelopes and pieces of wood enclosed (received in evidence at fols. 562, 564) ..... *

T. Stevedoring contract between War Shipping Administration and the Jarka Corporation (received in evidence at fol. 703) ..... *

U. Letter (received in evidence at fol. 710) . *

V-1 and V-2. Pieces of wood (received in evidence at fols. 828, 829) ..... *

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* Omitted pursuant to stipulation.

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PETER CALDAROLA,

Plaintiff-Respondent,

—*against*—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants-Appellants.

Statement Under Rule 234.

The above-entitled action was commenced by the service of a summons and complaint on defendants, Gerda Eckert and Thor Eckert, Jr., partners, doing business under the firm name of Thor Eckert & Company, on March 8, 1944. The answer of the said defendants was served on April 24, 1944. The plaintiff-respondent appeared by Abraham M. Fisch, Esq. Defendants-appellants appeared by Messrs. Kirlin, Campbell, Hickox & Keating.

The names of the original parties appear above in full, except that Moore-McCormack Lines, Inc., was originally named as defendant but was never served and was considered at the trial as not being a party to the action. Gerda Eckert and Thor Eckert, Jr., partners, doing business under the firm name of Thor Eckert & Co., were sued as Thor Eckert & Company, Inc. This misnomer was corrected at the trial.

2

Notice of Appeal.

SUPREME COURT

NEW YORK COUNTY

PETER CALDAROLA,

Plaintiff,

—against—

MOORE-McCORMACK LINES, INC. and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants.

8618/1944.

SIR:

PLEASE TAKE NOTICE that the defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department from the judgment entered in the office of the Clerk of the County of New York on June 13, 1945, which directed that the plaintiff, Peter Caldarola, recover of the defendants, Gerda Eckert and Thor Eckert, Jr., doing business under the firm name of Thor Eckert & Co., the total sum of $12,191.10, and that said defendants appeal from each and every part of said judgment as well as from the whole thereof.

3

Notice of Appeal.

Dated, New York, July 2, 1945.

7

Yours, etc.,

KIRLIN CAMPBELL HICKOX & KEATING,
Attorneys for Defendants Gerda Eckert and Thor Eckert, partners doing business under the firm name of Thor Eckert & Co., originally sued as Thor Eckert & Co., Inc.,
Office and Post Office Address:
120 Broadway,
New York 5, N. Y.

8

To:

ABRAHAM M. FISCH, Esq.,
Attorney for Plaintiff,
225 Broadway,
New York.

9

4

Summons.

SUPREME COURT

10

NEW YORK COUNTY

PETER CALDAROLA,

Plaintiff,

—against—

MOORE-McCORMACK LINES, INC., and
THOR ECKERT & CO. INC.,

Defendants.

11

Plaintiff designates New York County, as the place of trial.

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after service of this summons, exclusive of the day of service and in case of your failure to appear, or answer, judg-
12 ment will be taken against you by default, for the relief demanded in the complaint.

Dated, March 8, 1944.

ABRAHAM M. FISCH,
Plaintiff's Attorney,
Office and Post Office Address,
225 Broadway,
Borough of Manhattan,
New York City.

Complaint.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorney, Abraham M. Fisch, complaining of the defendants herein, respectfully shows to this Court and alleges:

First: Upon information and belief that at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. was a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States of America other than the State of New York.

Second: Upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. was a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States of America other than the State of New York.

Third: Upon information and belief that at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Fourth: Upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. was a corporation duly

organized and existing under and by virtue of the
16 laws of the State of New York.

Fifth: That upon information and belief that at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. had a place for the transaction of its business at No. 5 Broadway, Borough of Manhattan, City of New York.

Sixth: That upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. had a place for the transaction of its business at No. 19 Rector
17 Street, Borough of Manhattan, City of New York.

Seventh: That at all of the times hereinafter mentioned, the defendant Moore-McCormack Lines, Inc. operated and controlled, or was the charterer of the vessel known as SS Everagra.

Eighth: That at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. operated and controlled, or was the charterer of the vessel known as SS Everagra.

Ninth: That on the 27th day of January, 1944,
18 the defendant Moore-McCormack Lines, Inc. was the operator of a vessel known as SS Everagra, which on that day was in navigable waters at Pier 34, North River, Borough of Manhattan, City of New York.

Tenth: That on the 27th day of January, 1944, the defendant Thor Eckert & Co. Inc. was the operator of a vessel known as SS Everagra, which on that day was in navigable waters at Pier 34,

North River, Borough of Manhattan, City of New York. 19

Eleventh: That prior to the 27th day of January, 1944 the defendant Moore-McCormack Lines, Inc., pursuant to an arrangement entered into, had undertaken and agreed to operate the vessel SS Everagra, as agent for the owner or for those who had authority to possess and control the destinies of said vessel.

Twelfth: That prior to the 27th day of January, 1944 the defendant Thor Eckert & Co. Inc., pursuant to an arrangement entered into, had undertaken and agreed to operate the vessel SS Everagra, as agent for the owner or for those who had authority to possess and control the destinies of said vessel. 20

Thirteenth: That upon information and belief that on the 27th day of January, 1944, the members of the crew of the vessel SS Everagra were employed by the defendant Moore-McCormack Lines, Inc. as operator of the said vessel and as agent for those who had control of the destinies of the said vessel.

21

Fourteenth: That upon information and belief that on the 27th day of January, 1944, the members of the crew of the vessel SS Everagra were employed by the defendant Thor Eckert & Co. Inc. as operator of the said vessel and as agent for those who had control of the destinies of the said vessel.

Fifteenth: Upon information and belief that at all of the times hereinafter mentioned, the de-

fendant Moore-McCormack Lines, Inc. as operator
22 of the said vessel and acting as agent for those who had charge of the destinies of the said vessel, operated, controlled and maintained the said vessel, made repairs, hired the crew, paid the crew and did all things that is usually done by an agent or operator when employed to operate a vessel.

Sixteenth: Upon information and belief that at all of the times hereinafter mentioned, the defendant Thor Eckert & Co. Inc. as operator of the said vessel and acting as agent for those who had charge of the destinies of the said vessel, operated,
23 controlled and maintained the said vessel, made repairs, hired the crew, paid the crew and did all things that is usually done by an agent or operator when employed to operate a vessel.

Seventeenth: That on or about the 27th day of January, 1944, while the plaintiff was lawfully and properly upon the defendants' vessel SS Everagra, which on that day was in navigable waters at or about Pier 34, North River, Borough of Manhattan, City and State of New York and being at the time and place mentioned in the employ of a corporation other than the defendants and upon the
24 business which was of mutual interest to the defendants and the plaintiff's employer, he was seriously injured through the negligence on the part of the defendants, their agents, servants and/or employees and without any fault or negligence on the plaintiff's part which in anyway contributed thereto.

Eighteenth: That while the plaintiff was lawfully and properly on the vessel, as aforesaid, he was seriously injured when one of the booms which was a portion of the ship's equipment, broke, gave

way and fell. The defendants were negligent in failing to take the proper means and precautions to guard against and avoid the breaking of the said boom; the defendants failed to give the plaintiff a safe and sufficient place in which to work; failed to use reasonable care to inspect the booms and the appliances which kept the booms in place to see to it that they were in good condition and sufficiently strong enough to bear the weight placed upon them in the movement of cargo. That the falling of the boom which caused the plaintiff to be injured was caused by the fact that the boom and the appliances holding the boom in place were not constituted to bear the weight of the lifting and lowering of cargo. It was also caused by the fact that the defendants had failed to provide a good, sufficient and usual and customary preventor and that the failure to do so, was one of the causes for the breaking of the boom. That the boom which fell with the other appliances which gave way was a result of the defendants' failure to use reasonable care in making a proper inspection; in furnishing proper ship's equipment and to remedy any defect or danger which an inspection would have shown. That the defendants in control of the ship's equipment, its engines, boilers, etc., failed to supply sufficient quantity of steam and lifting power in order to lift and raise cargo, and by reason thereof, the stowing and the discharging of the cargo was not done in the usual and customary manner, which also was one of the causes for the boom breaking, all of which the defendants had notice thereof.

Nineteenth: That by reason of the carelessness and negligence on the part of the defendants, their agents, servants and/or employees, the plaintiff

was rendered sick, sore, disabled and injured,
28 bruised and wounded, from which injuries he has suffered, still suffers and will continue to suffer great physical pain and mental anguish, to his damage.

Twentieth: That by reason of the carelessness and negligence on the part of the defendants, their agents, servants and/or employees, as aforesaid, plaintiff has become disabled to such an extent as to seriously interfere with the active prosecution of his employment, and may in the future be
29 deprived of earning his livelihood, to his damage.

Twenty-first: That as a result of the injuries sustained by plaintiff as aforesaid, plaintiff has become indebted in sums of money in endeavoring to be cured of his injuries and to alleviate his pain and suffering, and as he has been informed and verily believes, will be compelled to incur future obligations in endeavoring to be cured of his injuries and to alleviate his pain and suffering, all to his damage in the sum of Twenty-five Thousand ($25,000.00) Dollars.

30 WHEREFORE, plaintiff demands judgment against the defendants herein in the sum of Twenty-five Thousand ($25,000.00) Dollars, together with the costs and disbursements of this action.

ABRAHAM M. FISCH,
Attorney for Plaintiff,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

Answer.

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., sued herein as Thor Eckert & Co., Inc., one of the defendants herein, answering the complaint by their attorneys allege on information and belief as follows:

First: They deny that they have any knowledge or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered First of the complaint.

Second: They allege that at the time of the commencement of the action, they were not a corporation. They deny each and every other allegation contained in Paragraph numbered Second of the complaint.

Third: They deny that they have any knowledge or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered Third of the complaint.

Fourth: They allege that at the time of the commencement of this action, they were not a corporation. They deny each and every other allegation contained in Paragraph numbered Fourth of the complaint.

Fifth: They deny that they have any knowledge
34 or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered Fifth of the complaint.

Sixth: They admit that at the times mentioned in the complaint they had a place for the transaction of business at 19 Rector Street, Borough of Manhattan, City of New York. They deny each and every other allegation contained in Paragraph numbered Sixth of the complaint.

Seventh: They deny each and every allega-
35 tion contained in Paragraph numbered Seventh of the complaint.

Eighth: They deny each and every allegation contained in Paragraph numbered Eighth of the complaint.

Ninth: They deny each and every allegation contained in Paragraph numbered Ninth of the complaint.

Tenth: They deny each and every allegation contained in Paragraph numbered Tenth of the
36 complaint.

Eleventh: They deny that they have any knowledge or information thereof sufficient to form a belief as to each and every matter contained in Paragraph numbered Eleventh of the complaint.

Twelfth: They deny each and every allega-tion contained in Paragraph numbered Twelfth of the complaint.

Thirteenth: They deny each and every allegation contained in Paragraph numbered Thirteenth of the complaint. 37

Fourteenth: They deny each and every allegation contained in Paragraph numbered Fourteenth of the complaint.

Fifteenth: They deny each and every allegation contained in Paragraph numbered Fifteenth of the complaint.

Sixteenth: They deny each and every allegation contained in Paragraph numbered Sixteenth of the complaint. 38

Seventeenth: They deny each and every allegation contained in Paragraph numbered Seventeenth of the complaint.

Eighteenth: They deny each and every allegation contained in Paragraph numbered Eighteenth of the complaint.

Nineteenth: They deny each and every allegation contained in Paragraph numbered Nineteenth of the complaint. 39

Twentieth: They deny each and every allegation contained in Paragraph numbered Twentieth of the complaint.

Twenty-first: They deny each and every allegation contained in Paragraph numbered Twenty-first of the complaint.

Answer.

Further Answering the Complaint, and as a First, Separate, Complete and Distinct Defense Thereto, Defendants Allege on Information and Belief as Follows:

Twenty-second: That if the plaintiff sustained any injuries as alleged in the complaint, said injuries were caused in whole or in part by his own negligence, and were not caused or contributed to in any manner by any negligence of these defendants.

Twenty-third: That the injuries to plaintiff, if any, arose out of certain risks, dangers and hazards, all of which were open, obvious and well known to him at and before his alleged injuries and all of said risks, dangers and hazards had been assumed by him.

WHEREFORE, the defendant demands that the complaint herein be dismissed with costs to the defendant as against the plaintiff, and each other further and different relief as the justice of the cause may require.

KIRLIN CAMPBELL HICKOX KEATING & MCGRANN,
Attorneys for the Defendants,
Gerda Eckert & Thor Eckert,
sued herein as Thor Eckert & Co., Inc.,
Office & P. O. Address:
120 Broadway,
Borough of Manhattan,
City of New York.

(Verified April 23, 1943 by Gerda Eckert.)

15

Judgment Appealed From.

SUPREME COURT

NEW YORK COUNTY

43

[SAME TITLE]

The above entitled action and the issues therein having been duly and regularly reached for trial on the calendar of this Court at a Trial Term, Part VI thereof on the 4th day of June, 1945 before the Hon. Mr. Justice James B. M. McNally, one of the Justices of this Court and a jury, and the parties 44
having appeared by their respective attorneys, and the issues having been duly tried on the 5th, 6th, 7th, 8th, 11th and 12th days of June, 1945 and the jury having on the merits of this action duly rendered a verdict in favor of the plaintiff Peter Caldarola and against the defendants Gerda Eckert & Thor Eckert Jr., doing business under the firm name of Thor Eckert & Co. in the sum of Twelve thousand ($12,000.00) Dollars.

Now, on motion of Abraham M. Fisch, attorney for the plaintiff, it is

ORDERED, that the plaintiff Peter Caldarola re- 45
cover of the defendants Gerda Eckert and Thor Eckert Jr., doing business under the firm name of Thor Eckert & Co. the sum of Twelve thousand ($12,000.00) Dollars, together with $191.10 costs and disbursements, amounting in all to the sum of $12,191.10 and that the plaintiff have execution therefor.

Dated: New York, June 13, 1945.

ARCHIBALD R. WATSON,
Clerk.

16

Extract From Clerk's Minutes.

SUPREME COURT

46

TRIAL TERM—PART VI

June 13, 1945.

[SAME TITLE]

I hereby certify that this cause was tried before Hon. James B. M. McNally and a Jury, on the 4, 5, 6, 7, 8, 11 and 12 days of June, 1945, and a
17 verdict rendered therein for the plaintiff for the sum of $12,000. Defendants' motion to set aside verdict was denied. 30 days stay of execution and 60 days to make a case allowed.

ARCHIBALD R. WATSON,
Clerk.

Recorded
June 14/45
Photostat Div.
N. Y. Co. Clk's Office.

48

Case and Exceptions.

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM—PART VI

PETER CALDAROLA,

Plaintiff,

—*against*—

THOR ECKERT & CO., INC.,

Defendant.

June 11th to 12th, 1945.

Before:

HON. JAMES B. McNALLY,

Justice,

and a Jury.

APPEARANCES:

For the Plaintiff:

A. M. FISCH, Esq.,
225 Broadway,
New York City.

For the Defendant:

KIRLIN, CAMPBELL, HICKOX & KEATING, Esqs.,
120 Broadway, N. Y. City.
By Raymond Parmer, Esq., of counsel.

JOSEPH G. GOLD, C.S.R.,
Official Court Reporter
1941 Haviland Avenue,
Bronx, N. Y.

Monday, June 4th, 1945.

52

Mr. Fisch: It is now admitted by the defendant that they are a partnership.

Mr. Parmer: We are a partnership.

The Court: You moved to amend the complaint, Paragraph 4th thereof, to read that Thor Eckert & Co., Inc., is a partnership instead of a corporation?

Mr. Fisch: That is right.

The Court: Motion granted on consent.

Mr. Fisch: And that the partnership consists of Gerda Eckert and Thor Eckert, Jr., partners, doing business under the firm name of Thor Eck-

53 ert & Company. Moore-McCormack Lines was not served and therefore it is not necessary to discontinue, and treated as if it never existed.

The Court: All right.

(Jury impaneled and sworn.)

(Mr. Fisch opened to the jury in behalf of the plaintiff.)

(Mr. Parmer opened to the jury in behalf of the defendant.)

54 Mr. Fisch: We should like at this time to offer the agency agreement into evidence. I think you have that together with the pleadings of the Court.

Mr. Parmer: I have an objection to his offer as a complete statement of the relations between the United States and the general agent. If it is subject to being connected up with the orders and regulations which are referred to in the contract, that is all right. I have no objection to that.

Mr. Fisch: I offer the contract in evidence. That is all I can do. That is the only thing I have. 55
I know nothing about the regulations.

The Court: Have you the contract and a copy which is attached to the complaint?

Mr. Fisch: That is the only thing I have. That was furnished to me.

Mr. Parmer: That is the contract, but on its face it refers to the orders and t' egulations. On its face it refers to the rules and regulations of War Shipping Administration and therefore if the contract is offered as a complete exposition of the relations between the United States and the 56
general agent, I object to it. However, I have no objection to it being offered subject to being connected up with the rules and regulations.

The Court: Overruled. Mark it.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Parmer: Your Honor will adjourn for the day?

The Court: All right, as I understand counsel are requesting an adjournment until tomorrow morning. 57

Mr. Fisch: We consent.

The Court: Ladies and gentlemen of the jury, you have been sworn as jurors in a cause. Do not discuss the case among yourselves nor permit anybody to discuss it with you and do not visit the scene of the accident. Ten o'clock tomorrow morning. Trial Term. Part VI. Room 331.

(Whereupon an adjournment was taken to Tuesday, June 5, 1945, at 10 o'clock, A. M.)

Tuesday, June 5, 1945.

58

TRIAL RESUMED.

(Same appearances.)

PETER CALDAROLA, residing at 1050-67th Street, Brooklyn, N. Y., the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Q. Mr. Caldarola, will you speak up so all the jurymen can hear you? Did you hear what I said? A. No. Come a little closer.

59

Q. No. I am going to stay here. Will you speak loud so we can all hear you? A. Yes.

Q. How old are you? A. Fifty-one.

Q. Were you hurt in January, 1944? A. Yes, sir.

Q. Where were you working? A. Pier 34, North River.

Q. What street is that? A. It's Canal Street.

Q. Whom did you work for? A. For Jarka Corporation.

Q. What is the business of Jarka? A. Stevedore.

Q. Is that the same thing as longshoreman? A. Longshoreman.

60

Q. What were you doing that day when you were hurt? A. Longshoreman.

Q. When were you hurt? Give us the date in January. A. January 27th.

Q. Now, how much experience have you had in longshore work? How many years? A. I started longshoreman in 1912.

Q. On the day of the accident, were you operating a winch? A. I was operating a drum.

Q. A drum? A. Yes.

Q. Which is that? A. The niggerhead. 61

Q. On what? A. On the Burton.

Q. On the Burton what? A. Burton fall.

Q. Burton boom? A. Burton boom.

Q. What is the Burton boom? What does it do? A. It delivering and discharge, delivering the cargo to the dock.

Q. How does the Burton boom work? A. Well, the two fall are "attached" together with the up-and-down, and the up-and-down comes up hatch, Burton takes up and brings to the dock.

Q. The up-and-down boom picks up the cargo, 62
is that right? A. The cargo from down the hatch.

Q. From down the hatch? A. And the Burton takes over and delivers to the dock.

Q. But the up-and-down boom—

Mr. Fisch: I am going to lead him a little bit, Ray, so the jury can get it.

Q. —picks up the cargo to a certain height, is that right? A. Yes.

Q. And then when the up-and-down gets the cargo a certain height off the deck— A. That's right, about a foot off the coam of the hatch. 63

Q. A foot off the coaming of the hatch? A. Of the hatch.

Q. And then your boom— A. My fall.

Q. Your fall, rather? A. The Burton fall.

Q. The Burton fall swings the cargo wherever you want to swing it to? A. Inshore.

Q. Inshore? A. Inshore.

Q. Were you working this niggerhead for the Burton—where were you working it on the day of the accident? A. On the day of the accident, yes.

Q. How many years of experience have you had
64 working the niggerhead? A. Oh, my God, I work it for years in the North River for that line, for the Hogan, White Star Line,—all over.

Q. What time was it you got hurt? What time was it that you got hurt? A. Well, it was about nearer to 1:30.

Q. 1:30 in the day? A. It was the first draft, 1:15, 1:20. It was the first draft.

Q. 1:20 in the afternoon? A. In the afternoon.

Q. Tell us how you got hurt, please. A. All day, we would take this draft, and when we had this draft, and when you got up on deck between
65 the coam of the hatch and the rail, I saw this draft drop on deck, and second right after that, something hit me in the head, and fell unconscious.

Q. What was the draft? What did it consist of? What were you lifting? A. Cocoa beans.

Q. How were those cocoa beans packed? Were they in cases or in bags? A. Bags, burlap bags.

Q. How many pounds did a bag weigh? A. Well I don't know.

Q. How many bags did you have in that draft? A. Nine bags.

Q. How were the bags slung around? What
66 did you tie them with? What were they tied with, these bags? A. I don't get you.

Q. How were they tied around, the bags? A. with slings, canvas slings. Canvas, canvas and the rope, see, so they wouldn't tear the bag at the bottom, you see, when you delivering them. We call them canvas slings.

Q. Were those cocoa bags in a net? A. No.

Q. Or did you have slings around them? A. No, slings, canvas slings.

Q. At the time that you were hurt, were the

cocoa bags being put into the hold or being taken out of the hold? A. Taken out of the hold. 67

Q. What hatch were you working? A. Number 3 hatch.

Q. With reference to the ship, where was it located? Was it located in the middle of the ship or fore or aft? A. In the middle of the ship in the bunker hatch. There used to be a bunker hatch.

Q. What happened to you when you were hit on the head? What happened to you? A. Fell unconscious.

Q. How long did you remain unconscious, do you remember? A. No, I don't remember. I don't know. 68

Q. Do you remember coming out of unconsciousness? A. I do remember coming out unconscious, yes.

Q. What did you see when you came out? A. Well, I see everything turn over, and for a while—

Q. Did you see the boom? A. Well, then after I asked the men—

Q. Never mind. Did you see the boom? A. I did.

Q. What did you see the boom—was it whole or broken? A. Broken. 69

Q. Whereabout was it broken? A. Where I was standing to work.

Q. Now, how long was the boom about? A. Well, there was a small piece and a long piece.

Q. When the boom was in good condition before it was broken, how many feet long was it? A. Well, it was about 30, 35 feet long.

Q. Made out of what? A. Wood.

Q. And where it broke off, did it break off near the top? A. No.

Q. Or on the bottom or in the middle or where?
70 A. Near the bottom.

Q. How many feet away from the bottom, if you say near the bottom? A. Well, I couldn't tell you exactly. I know it was—I saw the big piece laying there. I didn't see the small piece how big it was.

Q. Did you go any place after the accident? Were you taken any place? A. They took me right up to the office.

Q. And after that where did you go? A. In the hospital, in the ambulance.

71 Q. What hospital? A. Downtown Hospital.

Q. Where is it located? A. Broad Street, down —at the foot of Broad Street.

Q. That is New York, Manhattan? A. New York.

Q. Did you have any pain after the accident? A. Oh, yes.

Q. Where? A. I had a lot pain all over my head, all over my back, the head and my back. All my mouth was pained.

Q. When you were in the hospital, did you have any pain? A. I did.

Q. Where? A. Some—all over my head, in this
72 side here.

Q. How long did you stay at the Downtown Hospital? How long did you stay there? A. Four days.

Q. And after you came out, where did you go? A. Well, I asked my pal to take me home, because I wanted to get out of there. I felt so bad, I want to die home.

Q. How long did you stay home? A. Three days.

Q. And then where did you go? A. Then they took me in the ambulance. They took me to St. Peter's Hospital.

Q. And where is St. Peter's Hospital located? A. Henry Street, and Concord Street. 73

Q. How long did you stay there? A. I stayed there about 20-and 25 days, something like that.

Q. When you were in the St. Peter's Hospital, did you have any pain? A. Yes.

Q. Where? A. In my head, my back, way to my back, the spine.

Q. Then from the St. Peter's Hospital, you went home, did you? Did you go home after that? A. Yes.

Q. What happened when you got home? Did you walk around or did you stay in bed? A. No. 74 No. I had to stay in bed.

Q. For how long a time? A. Oh, for about two more months.

Q. Did you have anybody treat you while you were in bed at home? A. Yes, the doctors come.

Q. Doctors? A. Yes.

Q. What is the name of the doctor? A. Dr. Mulliko.

Q. Who is Dr. Mulliko? A. Dr. Mulliko is the assistant doctor of Dr. Patello.

Q. And he treated you for two months? A. Yes, and then he asked me to go to his office after, when I was able to walk. 75

Q. When you were able to go to the office, tell us whether there was anything wrong with you? A. Yes.

Q. What? A. I told him that the pain is still on the head and so much noise.

Q. Noise where? A. On my head.

Q. Noise on your head? A. Yes, noise.

Q. Wait a minute. How do you know you got noise on your head? A. My God, I can hear it.

Q. You hear the noise? A. You hear it. Also

I claim a lot of headache and dizzy. Every time
76 when I do something, go up and down, my head gets dizzy, and over here in the back, it's—

Q. You are pointing to the back of your head? A. Yes, of the head. It's a very sharp pain, and continually it comes up and bangs right in back here, rub-rank in back of my head here, and every time turn my head, all these bones squeak.

Q. Are you talking about the way you feel now or the way you felt when you went to the doctor? A. When I went to the doctor and the way I am feeling now yet the same way, and I told him that
77 my neck—I can't turn my neck, it pained. The doctor told me can't do nothing about that, it will reman like that.

Q. What was your condition before you got hurt? A. All right.

Q. Condition of health. A. Well, I just had diabetes, that is all, and I was take care of diabetes, and I was strong.

Q. How long did you have diabetes, before you got hurt? A. About ten years.

Q. How many years? A. Ten years.

Q. Did you take anything for it? A. Yes.

Q. What did you do? A. Insulin.

78 Q. Do you still take insulin? A. Yes, sir.

Q. Every day? A. Every day.

Q. Did you ever anything wrong with your head or did you feel dizzy? A. No, never did.

Q. Did you ever have any noise in your ears? A. No, sir.

Q. What sort of noise is that? Can you describe it to us, please? A. Yes, sir about a hundred chicks, chip—hear a lot of chicks chipping.

Q. A lot of chicks? A. Chicks.

Mr. Parmer: Chickens.

The Witness: Chickens. That is what I hear all over my head, and whistle like a peanuts whistle, peanuts stand—e-e-e-e, and chicks chipping, ch-ch-ch-ch otherwise, just like I have a storm when the rain hits on the ground. All that noise. 79

By Mr. Fisch:

Q. Have you returned to work since the accident? A. Eh?

Q. Have you gone back to work since the accident? A. No, sir. 80

Q. Why? A. Well, I have pain and dizzy. My neck pain.

Q. Have you tried doing any work? A. All I did in my house is take can out. That is all.

Q. What happens when you take a can out and do something? A. Well, I get dizzy. It hurts my head; every time I put my head down, it hurts my head.

Q. You worked as a longshoreman. What was your average earnings? How much did you make a week on the average, about? A. About $43.

The Court: Will you suspend just a moment? 81

(Short recess declared, following which the trial was resumed.)

Cross Examination by Mr. Parmer:

Q. Mr. Caldarola, at what pier was this vessel on which you were when you were injured? A. Pier 34, North River.

Peter Caldarola—for Plaintiff—Cross.

Q. Is that a Moore and McCormack pier? Is
82 that a Moore and McCormack pier? A. On the north side.

Q. Has that got Moore & McCormack on the outside of it? A. It's on the north side of the dock.

Q. You do not know which pier it is? A. Pier 34 North River.

Q. You don't know whether it's Moore & McCormack's pier, do you? A. Well, it's close to the dock.

Q. What?

By the Court:

83

Q. Is it a Moore & McCormack pier, the lawyer wants to know? Do you know Moore & McCormack? Don't you? A. McCormack.

Q. Moore & McCormack. A. No.

Q. Is it on the Moore & McCormack pier? A. I don't know.

Q. You don't know? You are hard of hearing, aren't you? A. yes.

By Mr. Parmer:

Q. Mr. Caldarola, your job was handling the
84 fall or the rope on one of these drums? A. Yes, sir.

Q. And your drum was the nearest one to the dock? A. Yes, sir.

Q. In doing the work that you were doing at the time of the accident, how many turns of the rope did you have around the drum? A. Well, I had four turns.

Q. And was it rope that you were using? Was it rope? A. Rope, yes.

Q. And did you operate in this way, Mr. Caldarola: In order to pull the load, you tightened up on the free end of the rope which you held in your hand? A. You take one turn when you start. 85

Q. Yes? A. Take the slack, have to set up tight the slack. Then you put the rest of it enough for the load to pull.

Q. You keep that free end of the rope in your hand just tight enough so that there will be friction on the drum, is that right? A. You hold tight.

Q. Yes? A. See, when you take the slack, before you take the draft in and you taper it only one turn and you take the slack. 86

Q. Yes. A. So this way it won't catch no turn. After you take all the slack, is set tight, then you put the rest of the turn and you pull the draft.

Q. In other words, you pull the free end of the rope off the rope? A. Off the drum.

Q. And it keeps rolling around, rolling around? Is that the way you work it? A. No. The winch is rolling all the time faster than the fall, but the adjustment is on the fall as the draft you go by.

Q. If you want to keep the draft from pulling, you just ease off on the rope, don't you? A. No, you put a hand on top of the turn.

Q. Yes? A. And you hold it, because the drum has got to keep going all the time in order to hold the weight. If you stop the winches, then the turn don't reverse. The weight pulls the winch in reverse. 87

Q. You mentioned something about—you did something so that the turns wouldn't get caught. What is it you do so that that won't happen? A. You take in the slack, as I say, until the fall gets tight. Then you put the rest of the turn enough to pull the draft.

88 Q. Now, do you have to be careful to see that these turns do not ride one over the other? A. No, you don't have to be very careful because the leader is rigging the weight. That comes to the drum on a slant, that the fall never catch him, and the leader was riggin' the proper way.

Q. If the turns, if one of the turns rides over one of the other turns, what happens then? A. You stop the winches.

Q. But if you don't stop the winches, what effect does that have on the work that you do? A. We stop the winches. You can't go ahead.

89 Q. Suppose the winches don't stop but they keep on going and one turn rides over the other, what effect does that have? A. You grab with your hands, like that, and slide it before you go worse. You hold the turn.

Q. But suppose— A. When you hold the turn, the drums running free.

Q. Assume that the one turn overrides the other and binds on the drum, what happens then if the winch keeps on going? A. Well, depending if that keeps on, take the fall, that's all.

Q. Before this accident happened, didn't one of your turns on this drum ride over the other? A.

90 No, sir.

Q. Do you recall before this boom fell down, it was raised up so that it was almost parallel with the mast?

Mr. Fisch: Excuse me a minute.

(Discussion between counsel off the record.)

Mr. Parmer: I am sorry. I am told "recall" is a five-dollar word. I will use a different one.

By Mr. Parmer:

91

Q. Do you remember that before the accident happened this boom which was near you— A. Yes?

Q. —was caused to raise up so that it was almost in a line with the mast? A. No, on a slant.

Q. That is the way it was when it was doing the work, is that right? A. Yes, on a slant.

Q. It was on a slant over the side of the ship and onto the dock? A. Yes. Well, on a slant like that.

92

Mr. Fisch: Just a minute.

A. Spread out on the dock.

Mr. Fisch: May we not—

Mr. Parmer: I will bring it out.

Mr. Fisch: May we have the slant for the record, please?

The Court: Yes.

Mr. Fisch: I do not want to interrupt you, but I want to get the slant for the record, what that slant is.

The Court: Indicate again the slant.

93

By Mr. Parmer:

Q. Indicate what you mean by the slant, what slant it was. A. On the side on the proper way.

Mr. Fisch: Hold your hand there.

Q. Hold your hand there. Hold your hand in the position that you just put it.

The Court: Will counsel say what degree?

Mr. Fisch: What do you say?

94 Mr. Parmer: I should say it is roughly 40 degrees.

Mr. Fisch: All right.

Mr. Parmer: Forty degrees from the horizontal.

By Mr. Parmer:

Q. And it extended over the dock? A. Outside the rail of the ship.

Q. You mean by that over the dock? A. Over the dock, about three feet away from the rail.

95 Q. You say that it never left that position before the accident until it fell? A. Pardon?

Q. And you say that it never left that position until it fell on you? A. Never left the position?

Mr. Parmer: Strike that out, if you will.

Q. It was in that position just before— A. It was in that position.

Q. It was in that position just before it fell on you? A. Yes.

Q. Is that right? A. It was in that position, we were working, while we were working before

96 the accident.

Q. What I want to know then, Mr. Caldarola, is before the boom fell on you whether anything took up from that position that you have just described where the boom extended over the side of the ship and towards the dock? A. Towards the dock?

Q. Did anything happen to it? A. Well, the boom broke.

Q. Yes. Let me show you a picture, Mr. Calda-

rola, and ask you if you recognize it as the Steamship Everagra on which you were hurt as it was right after the accident? A. No, sir. That boom was not like that after the accident. It must have been slide over. It was towards a little more this way, the boom. 97

Q. Is that the ship on which you were hurt? A. Yes, sir.

Q. Does that show the winch at which you were working? A. Yes, sir, over here. There's the Burton.

Q. Does it show the broken boom? A. Is it over here? 98

Q. Does it show it or not? A. Eh?

Q. Does it show the broken boom? A. Well, it's behind the drum. It don't show now, but that boom was laying over here, and this was way up.

Q. You say the boom was in a different place—listen to me—was in a different place after the accident from that shown in the photograph, is that right? A. Yes, sir.

Q. But that is the boom which broke— A. That is the boom.

Q. —which showed in the picture, is that correct? A. Yes.

Q. And that picture shows the deck layout? A. 99
Just a minute.

Q. All right. Take a look at it. A. No, sir. This is not the boom. That is the new boom. There is a riggin' over there, full turn tackle put on. That was only on single, double one run turn. That is a new boom.

Mr. Parmer: May we have this marked for identification, please?

(Photograph marked Defendant's Exhibit A for Identification.)

By Mr. Parmer:

Q. Now, I want you to look at another picture, Mr. Caldarola, and ask you if that shows the ship on which you were working at the time of the accident? A. This is the same ship, the same hatch.

Q. And does that show the winch at which you were working? A. Yes, sir.

Q. Does it show the broken boom? A. Yes, sir.

Q. Does it show it in the place it was after the accident? A. No, that boom was way out; the end of this boom was by my place there.

Mr. Parmer: I offer this in evidence.

Mr. Fisch: No objection.

(Photograph received in evidence and marked Defendant's Exhibit B.)

By Mr. Parmer:

Q. Now, Mr. Caldarola, I want to call your attention to this Exhibit A for Identification, that is the photograph which I showed you first, and which you said did not show the broken boom but showed the new boom. I want you to compare that exhibit with Exhibit B which is in evidence and see if you did not make a mistake. In other words—don't you see— A. Yes.

Q. —that A and B are two pictures of the same thing from a different place? A. No. The riggin' over here and the masthead, see, that's the old boom with only a double running cable. Over here is four. That is where they put it.

Q. Let me call your attention to this, Mr. Caldarola: Here is Exhibit B with the boom which 103
you say was the broken boom. A. Yes.

Q. Here is Exhibit A with the boom which you say is the new boom. Don't you see that this object which you call a new boom, in Exhibit A, is the same object but taken from a different position, as the object which you call the broken boom in Exhibit B? A. Well, here—why you have a different riggin', because you can't see the broken part in here, and behind the drum.

Q. Can you answer that question? Can you see that it's the same thing and in the same place, or 104
not? A. The top here, the small piece.

Q. That is a different thing that we are talking about. We are talking about this long piece. Don't you see it's the same thing in both photographs and the same position, only one is taken from one position and one is taken from another? A. I have a different thing in here, and the riggin' over here is only—and over here is different. It's four turns tackle.

Q. All right. Now, looking at Exhibit A again, do you see that part of the broken boom which was attached to the mast? A. Yes.

Q. That appears at the place where I am point- 105
ing, does it not? A. Yes.

Mr. Parmer: I will mark it, if you please, with an arrow at the end of which we will put the letter "A".

Could I now offer this in evidence?

Mr. Fisch: No objection.

(Defendant's Exhibit A for identification now received in evidence.)

Mr. Parmer: Your Honor, may I show
106 this to the jury now?

The Court: Certainly.

Mr. Parmer: —And suspend the questions while they are examining the photographs?

The Court: Certainly.

(Defendant's Exhibits A and B shown to the jury.)

By Mr. Parmer:

107 Q. Mr. Caldarola, will you look at this B. Is this the drum at which you were working, that I am pointing to now? A. Yes, sir.

Mr. Parmer: I will mark that with a "D."

Q. Will you point out where you were standing in doing your work at that drum? A. I was standing behind the drum.

Q. Let's put a "C", your first initial, to show the place where you were standing. Is that right? A. Yes.

108 Q. Now, this boom which hit you was extending over the dock, correct? A. That is right.

The Court: Over the dock or over the pier?

Mr. Parmer: Over the pier. Shall I refer to that as the pier, your Honor?

The Witness: Not over the pier, but up against the pier; not over.

By Mr. Parmer:

Q. Not over the whole pier or the whole dock, but over— A. Towards the pier. Towards the pier. 109

Q. Yes, across a portion of the pier or a part of the pier. A. Or up against the pier, right up to the door there, not inside there, but just close between the rail of the dock enough, the draft—

Q. Around the pier there is what is called a stringpiece, isn't there? A. That is right.

Q. And that part of the pier is how wide? A. Well, I think it's about four foot, something like that. 110

Q. And did the boom extend over that stringpiece? A. No.

Q. Where were you running the cargo, where? A. On the stringpiece.

Q. On the stringpiece? A. Yes, in the center, about two feet away, two foot and a half away from the ship.

Q. Now, did the end of the boom extend so that the fall would come down on the stringpiece? A. Yes.

Q. You have already told us the angle that the boom had to the horizontal, remember, about 40 degrees we judged it? A. Yes. 111

Q. I want you to tell us what the angle was that the boom had with the length of the ship? A. The length of the ship, there was about ten feet.

Q. Now, assume that this shelf you have in front of you is the length of the ship, and here you have the stringpiece alongside. Now, here you have the boom which you say was at an angle of approximately 40 degrees with the horizontal. Do you understand that? What I want you to tell

us is, what was the angle with the length of the
112 ship? Was it that way, was it that way, was it this way, or what way was it? You tell us. A. Towards—

Q. Do it there. We will judge what you say. A. Towards the back of the ship, like that (indicating).

Mr. Fisch: What angle is that, Mr. Palmer?

Mr. Palmer: I would say it's about an angle of 40 degrees to the perpendicular, that is, the perpendicular being to the side
113 of the ship.

By Mr. Parmer:

Q. Now, I show you this picture. Does that show the place where you were working? A. Yes, sir.

Q. Does that show the broken boom or any part of it? A. Well, there is a piece on top of there and the other one is way in the back.

Q. Can you see the short piece of the broken boom which is next to the mast? A. Yes.

114 Mr. Parmer: I offer that in evidence.

Mr. Fisch: No objection.

(Received in evidence and marked Defendant's Exhibit C.)

By Mr. Parmer:

Q. Now, looking at this Defendant's Exhibit C, will you point out where you were standing and doing your work? A. Behind the drum.

Q. Behind the drum? A. Right there. Behind it. There is the boom, more on this side. 115

Q. Well, wherever you say, you tell me. A little more on the side, right behind it, on the edge of the drum? A. That's it.

Q. Like that (indicating)? A. Yes.

Q. I am putting an "X" there. A. Yes.

Q. That is where you were standing? Correct? A. Yes.

Q. And can you draw a line from this shackle here showing the direction that that boom had with the length of the ship? A. Well, I can't. I am not a painter or something. It comes up this way, like that, the top like. 116

Q. You can't do it? A. It comes across like that (indicating). The end here is placed in here. You can see the length of the cable here, how high it was, way up in the air. When you put that up, they can judge how high in the air it is.

Q. I want to know whether you can give the jury an idea by drawing a line on the picture the way the boom extended with respect to the line of the ship. If you cannot do it, it's all right. Maybe it's too much for you, but if you can— A. I can't.

Q. All right. 117

(Defendant's Exhibit C shown to the jury by Mr. Parmer.)

(A recess a declared, following which the trial was resumed.)

Peter Caldarola—for Plaintiff—Cross.

PETER CALDAROLA, resumed the stand and testi-
118 fied further as follows:

Cross Examination by Mr. Parmer (Continued):

Q. Now, Mr. Caldarola, I want you to look at this Exhibit C again. You recall that this X that is marked on here shows the place where you were standing? A. Yes.

Q. That is where you were standing when you were hurt, is that right? A. Yes.

Q. Now, I am going to put this pencil at the place where the boom joins the mast in the pic-
119 ture and try to put it at approximately what you said the angle was with the length of the ship, or the degrees. A. The boom was something like that.

Q. Like that? Is that the way you put it? A. Right, inshore, towards the rail.

Q. Am I holding—like that? Am I now holding the boom the way you told me it was with respect to the mast? A. This way (indicating).

Q. This way?

Mr. Parmer: May we have the witness show this to the jury?

120 The Court: Yes. Why don't you mark it?

Mr. Parmer: I cannot mark it. He cannot draw a line.

The Court: Let him step down.

(The witness left the stand and stood before the jury.)

By Mr. Parmer:

121

Q. Now, will you hold the pencil against the place where the boom was attached so that the jury gets the idea the way it was? A. Standing like this (indicating).

Q. That is directly over the side of the ship? That is the way it was, right? You have the pencil directly up against the photograph, do you? A. Like this.

Mr. Fisch: Mr. Parmer, what angle would you say that was?

122

Mr. Parmer: The way he showed it?

Mr. Fisch: The way he is showing it now.

Mr. Parmer: Illustrate it. It would be 90 degrees. It would be perpendicular with the length of the ship, at right angles to it. That is what I figured he means. He is putting it like that (indicating).

Mr. Fisch: No; no.

Juror No. 2: No. He is putting it like this (indicating).

Mr. Parmer: I agree with you. Forty degrees still with the horizontal.

123

Mr. Fisch: All right.

By Mr. Parmer:

Q. But what I want you to do, maybe you misunderstood me—

The Court: Keep your voice up now, Mr. Parmer.

Q. I am not trying to get the angle to the hori-
124 zontal. That is the angle to the deck of the ship. That is to the horizontal deck of the ship. I am trying to get the angle with respect to the rail of the ship. Do you understand what I mean? A. Yes.

Q. That is what I want you to illustrate to the jury. A. Well, from the rail to the boom, from here, it was standing close to the roof of the dock. It was reaching up here to the top of the dock, understand, the boom.

Q. Let me show you what I want you to tell
125 us, if you can. I am putting this boom here at that 40-degree angle with the dock or as near as I can get to it. I want to know whether it was this way or this way (indicating). A. No, towards the dock, outside the dock, like that (indicating).

Q. It was toward the dock? A. Toward the dock, to the door. There is a door there, and this boom, way up here, reaches outside the rail by the dock.

Q. Now, as it passed over the rail? A. Passed over the rail, about.

Q. As it passed over the rail at this 40-degree
126 angle, was it like that (indicating) or like that, or like that? A. Toward the forward part of the ship.

Q. Towards the forward part of the ship? A. Like that (indicating).

Q. Just to illustrate it for the jurors, on this mast, would that be the position then? A. No. That is toward the deck. We don't delivery on the deck. We deliver on the dock.

Q. Isn't this forward part of the picture the

forward part of the ship that you just talked about? A. Yes, from where the boom is. 127

Q. Yes? And was the boom at a general angle toward the forward part of the ship? Is that what you are telling us? A. On the dock.

Q. On the dock? A. On the dock. That is the aft part of the ship. This is the fore part of the ship, and the boom was standing right to this door here.

Q. Which door? A. Over here (indicating).

Q. Can you mark the door? A. No, you can't see the door. The picture don't take the door.

Q. Mr. Caldarola, I will draw a line. You tell me whether it is correct or not. This is the line which the boom has with respect to the rail, and I want you to tell me whether the line is correct. Is that right? A. No, it was above, but it was in that plane, you understand? 128

Mr. Parmer: I will withdraw the question.

Mr. Fisch: Let him draw the line.

Mr. Parmer: If he can, I'd be glad.

By Mr. Parmer:

Q. Can you draw the line? A. How can you draw here? It comes up this way. 129

Mr. Fisch: All right, draw it.

The Court: You lawyers had better describe that, because it is meaningless on the record.

Mr. Parmer: Let us mark the line the witness just drew. This is on Exhibit C, and we will put a "C" at one end and a "C" at the other.

Mr. Fisch: Take that off.

130 Mr. Parmer: We will need an eraser.

Mr. Fisch: I think I can give you one.

By Mr. Parmer:

Q. Mr. Caldarola, I want you to look at Photograph B. Do you suppose that you could mark it better on that or could you point to the door toward which this boom extended? A. This.

Q. Now, would you mark that, please?

Mr. Parmer: Now, we had better—this

131 is Exhibit B—We had better mark that "B" for boom. We already have "C" on it.

All right, will you resume your place on the stand, Mr. Caldarola, please?

(At this point the witness resumed the stand.)

By Mr. Parmer:

Q. Now, Mr. Caldarola, if the boom was in the position that you have marked in Exhibits C and B and broke at the place shown in the photograph,

132 don't you see that in breaking it couldn't hit you? A. Certainly.

Q. Can't you see that? A. Why, certainly. First of all, that boom there, it was not in position at the time the accident fell. That boom has been removed. Everything been removed in different position.

Q. I don't mean the broken boom. A. Yes.

Q. I am talking about the boom itself, if it was in the position as you have described as marked on

the photographs just before the accident happened and it broke right near that iron part, as you see 133
in the picture, don't you see that this on breaking was to one side of the place where you were standing? A. Well, it broke there, right where I was standing. Of course the boom,—I can't exactly tell you if I am knocked unconscious—I can't tell you exactly how that boom hit me.

Q. No. A. Probably ask the witness. I can't tell exactly how that boom hit me. I was knocked unconscious underneath.

Q. I want to know whether you cannot remember that something happened to that boom beside 134
just breaking while it was extended over the dock. Don't you remember something happened to that in order to get to a place where it could fall and hit you where you were standing? You don't remember that? A. No.

Q. Did this boom, when it fell, hit you on the back of the neck? A. It fell on top of the head. I fell right on top of my head, all this side here, and knocked right out in a second. That I can tell you very much.

Q. Is this the part of the head it hit you, near the back of the neck? A. Oh, on the side here. This is all sharp pain. 135

The Court: Indicating the right side of the head.

The Witness: The right side.

Q. Is that where the boom hit you, on the right side of the head? A. On top here and on back here. I had that pain on one side, bleeding.

Q. Have you been able to earn any money at all since your accident? A. No, sir.

Q. Did you have some money saved up upon
136 which you have been living? A. Well, my children—

Mr. Fisch: Wait a minute. That is objected to, your Honor.

The Court: Sustained.

Q. Did you say that you have been taking care of a house? A. Taking care of a house?

Q. —In your direct testimony? A. My home—

Q. What? A. My home, my home, doing something in the home.

137 Q. Oh, I see. You merely work around your own home? A. Take the can up.

Q. What? A. Take the garbage can out.

Q. I see. Is that a one-family house? A. Yes, sir.

Mr. Parmer: That is all.

Mr. Fisch: That is all.

(Witness excused.)

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138 VINCENT RUSSO, residing at 1534 Benson Avenue, Brooklyn, N. Y., called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. What work do you do, Mr. Russo? A. Stevedoring.

Q. How old are you? A. 28.

Q. And for how many years have you been doing stevedoring work? A. Six years. 139

Q. At the present time, by whom are you employed? A. John T. Clarke.

Q. What is their business? A. Stevedoring.

Q. Have you worked before you came into court this morning? A. I did.

Q. How much of a stretch? A. I worked all last night.

Q. Do you occupy any position in stevedoring, any special kind of work that you do? A. I am a crane driver.

Q. Crane? A. Crane driver. 140

The Court: Keep your voice up, Mr. Russo.

Q. Do you remember on Jaunary 27th, a little over a year ago, when Caldarola, the witness that was on the stand before you, was hurt? A. I do.

Q. Were you working on that shift that he was hurt on? A. I was.

Q. What work were you doing there? A. I was the hatch foreman.

Q. Was it the ship Everagra? A. The name of the ship? 141

Q. Yes. A. I believe it was.

Q. What hatch were you working at? A. Well, that day we worked two hatches, No. 4 hatch, and we were shifted over to No. 3 hatch.

Q. Will you describe just what your duties were? What did you have to do? You told us what your title was. What was the nature of your work? A. Oh, I had to make sure that the gang kept working to get the cargo out of the hatch, place it on the dock in the right places.

Q. At the time of the accident what hatch were
142 you working at? A. No. 3 hatch.

Q. How many men did you have in your gang? A. Thirty-two.

Q. Some were where? A. Some were down the hold, five on deck, eight down the hold, and the balance on the dock.

Q. What were you loading or unloading? A. We were discharging.

Q. What was it you were discharging or unloading? A. Cocoa beans.

Q. Where were the cocoa beans located in the
143 ship? A. In the lower hold.

Q. Did you have a tween deck there? A. We did.

Q. Now, the cocoa beans were taken out how? Did you use a net or a sling? A. We used slings.

Q. How many to a draft? A. Nine bags to a draft.

Q. A draft means the amount of cargo that you take or put in at one time, is that correct? A. That is correct.

Q. Now, how many booms were there at No. 3 hatch? A. Two booms, Burton and the up-and-down.

Q. The Burton boom is used for what purpose?
144 A. To discharge the cargo onto the dock, from the ship to the dock.

Q. Does the Burton boom swing? A. It doesn't.

Q. How do you get it onto the dock then? A. Well, it comes from down a hatch, down a hold, up with the up-and-down, is taken over by the Burton right into the dock.

Q. Do you say the Burton boom is stationary? A. Both booms are stationary.

Q. The only thing is the fall from the Burton

takes, pulls the pulleys through the up-and-down to the place where you want to take it, is that it? A. That is correct. 145

By the Court:

Q. What does the fall do, swing inshore? A. There's two falls, one on the up-and-down and one on the Burton. When he picks it up with the up-and-down, the fall from the Burton pulls. Because he is pulling, the fall from the up-and-down slackens off, they meet together, and down at the dock it goes. Two men takes to operate that. 146

By Mr. Fisch:

Q. How many men did you have at the winches? A. I had three men at the winches, one on the gangway, and one relief man.

Q. Let us talk about the winches. How many winches are there at that point? A. There's only one winch.

Q. Well, are there drums or niggerheads? A. That's right.

Q. How many? A. Two of them.

Q. Did you have one man operating the winch? A. I did. 147

Q. And a winch is what? A. Steam.

Q. A winch is a mechanism that controls the movements of the booms and the falls, and so forth, is that right? A. That is right.

Q. Its power is steam? A. That is correct.

Q. Then did you have a man at each of the niggerheads? A. That's right.

Q. I show you a photograph marked Defendant's Exhibit A and I'd like you to step down here,

please, and show us the niggerheads and which is
148 the Burton and the other, the up-and-down.

(Witness leaves the witness chair and stands in front of the jury box.)

Q. I will hold it up. You can do the showing. A. These are the niggerheads. That is the Burton niggerhead. That is the up-and-down. This is the Burton boom, and this is the up-and-down boom.

Q. Now, what are those drums in between?

A. They should not be there. That probably must be oil or something.

149 Q. What are those round cylindrical objects here? What is this here? A. That is also a niggerhead.

Q. But the niggerhead that catches this one is where, you say? A. Is on the other side, the up-and-down.

Q. Does it show in here? A. This is the up-and-down, yes.

Q. The extreme end? A. That's right, both extreme.

Q. Will you make a letter "X" on both of them, please, with the red pencil? Now, we have got a
150 boom that is lying down, apparently the broken boom. Which is the broken boom, the up-and-down or the Burton? A. The Burton.

Q. Will you put the letter "B" on the boom, showing it's the Burton?

(Witness marks as directed.)

Q. Now, can you see the up-and-down boom on this photograph? A. (Pointing.)

Q. Put a letter "U" on it.

(Witness marks as directed.)

151

Mr. Fisch (to the jury): You will be able to see it later on. It is all marked.

By Mr. Fisch:

Q. How did you have these booms rigged? Can you give us an idea as to the degree or angle, with reference to the ship? A. I don't know what you mean, how I could describe an angle.

Q. Now, if I gave you a pencil and you assume that this part is the deck of the ship— A. Yes.

152

Q. And you have got your winches and you have got your hatch, you can do it any way you want. Assume that. You have to assume that this is the deck, flat. Take your pencil and show us the angle that the boom— A. The ship was, to my way, was in this way, toward the bulkhead.

Q. Just a moment. A. This would be the dock.

Q. This would be the dock? A. That's right. The Burton was at this angle.

Q. That is the boom? A. That's right.

Mr. Fisch. I think it's about, say, 40 per cent angle.

153

Mr. Parmer: Forty per cent with a horizontal deck, and I should say he has about 40 per cent to the perpendicular, 40 degrees from the perpendicular, drawn to the length of the ship.

By Mr. Fisch:

Q. Now, when had you started doing your work on this ship? Was it the day of the accident or

some time before then? A. The time we started
154 the other hatch?

Q. No. When did you start to work on the ship? A. Oh, about four or five days.

Q. Had you ever used the hatch No. 3 before? A. No, sir.

Q. Is this the first time you were using it? A. That's right.

Q. Did you rig these booms? A. We did not.

Q. Did you find them rigged? A. That is correct.

Q. In that position? A. That is right.

155 Q. Was that the usual and customary position of booms? A. That's right.

Q. What time of day did you start to work at No. 3 hatch? A. I think we started in the early part of the morning; about 10 o'clock, we had finished the other hatch, No. 4, we shifted over to No. 3.

Q. Did you change the position of these booms from the time you started to work at 10 o'clock until Caldarola was hurt? A. No, sir. There was a gang working there the previous day.

Q. Did you change the position? Listen to the question, Mr. Russo. You started to work at 10
156 o'clock? A. That's right.

Q. Did you change the position of those booms— A. No, sir.

Q. —from 10 o'clock until the accident occurred? A. No, sir.

Q. What time was it the accident happened? A. It was right after lunch, about 20 after, 25 after.

Q. After what? A. One o'clock.

Q. Tell us how it happened, please. A. Well, when we started in the afternoon, they took out the draft. As it was coming up, it was going across

to the dock, and all of a sudden, as I was coming along, I heard a snap, and down came the boom. I saw he got hit on the head, and he went down. He went out like a light. So, I ran right out to get an ambulance. 157

Q. How far were you away from the place where this boom snapped? A. About three or four feet. I was coming toward it.

Q. You say you were talking out this draft of cocoa beans, is that correct? A. That's right.

Q. Had the draft come out of the hold? Was it resting above the square of the hatch? A. It was.

Q. Had it reached the pier yet or had it not? A. No, sir. It had not reached the pier yet. 158

Q. Was the draft wholly where the ship is? I mean, did any part of the draft leave the area of the ship? A. No, sir.

Q. How far above the deck of the vessel was this? A. It was between the hatch and the side of the ship, right off the hatch.

Q. Could you, if I showed you this photograph marked Defendant's Exhibit A—is there any part of that ship that you could mark that would show where the draft was at the time it snapped? A. I can.

Q. Make the letter "D." That will stand for "draft." A. Just about there. 159

Q. And how many feet was it from the deck? A. Just about right—just about that high off the railing.

Q. Railing is one thing, deck is another. How many feet off the deck? A. I don't know. I don't remember how high the railing was.

Q. Assume that the railing was three feet high, was it over the railing, above the railing, or below

the railing? A. That would be three feet above the
160 railing. It would be about six feet.

Q. Six feet above the deck? A. That's right, above the deck.

Q. The draft, although having these bands, you say you used slings? Is that correct?— A. That is correct, slings.

Q. Was held in position or was being moved by the falls, by the cables, is that correct? A. I don't know what you mean by that.

Q. The cables held the draft in position, did they not? A. That is right.

161 Q. And these cables connected with the top of the boom, is that correct? A. That is correct. it wasn't cables. It was rope.

Q. All right, rope. What sort of rope? Was it manila or sisal, if you know? A. I don't know. I wouldn't know what they are.

Q. You don't know? Now, did you examine those broken ends of the boom? A. I did, when I come back.

Q. What did you find? Tell us what you saw. A. Well, when we went over to look at it, to see how a thing like that would happen, we saw that boom was just eaten away; it was rotten.

162 Q. Did you put your fingers to it? A. Yes, we touched it; just like as if it was sawdust, rot, wood you could pick out of the ground that was in dirt for a year or something; just melted away.

Q. Was it on one part of the boom or more than one part? A. It was more than one part. It was just a little piece that was good.

Q. Just a little piece that was good? A. If you take the whole thing, round, almost about three-quarters baked in.

Q. When you say "almost about three-quarters

baked in," what does it mean? A. I would say three-quarters of that there end there was rotten. 163

Q. And in the manner in which you described before that the wood was? A. That's right.

Q. What did you say? A. It was like sawdust, like sawdust; when you touch rotten wood, it just eats away. You can just drop it down on the deck. In fact, there was plenty on the deck.

Q. You found that in three-quarters of the boom? A. Around one end. Three-quarters is right.

Q. What was your duty there at that time of the accident? A. Hatch foreman.

Q. Hatch foreman? When the ambulance arrived, did the ambulance take Caldarola? A. Well, I stood up at the deck. Two men helped him down. I stood up on deck, because I had to keep the gang moving over, because we shifted to No. 2 hatch. 164

Q. What niggerhead did Caldarola operate? A. The Burton.

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Mr. Russo, was this a Moore-McCormack pier that this boat was at? A. I don't know if it was Moore-McCormack. We work for the Jarka Stevedoring Company. 165

Q. Was it your business when you got to this No. 3 hatch and before you began to work there to look at the rigging and to satisfy yourself that it was proper for your work? A. Well, it was rigged up all right. I mean I had five deck men. They checked everything.

Q. What is that? A. My deckmen checked up.

Q. That was part of your business, to check it,

to see that it was rigged the way it needed to be,
166 in order to do your work? A. That is correct.

Q. You did check it or had your men check it? A. We had everything checked.

Q. And it was satisfactory to you? A. That's right.

Q. And then you continued with the way it was rigged already? A. That's right.

Q. Were you coming toward Caldarola at the time that the accident— A. Not toward Caldarola, toward No. 3 hatch.

Q. In which direction were you proceeding, for-
167 ward or aft? A. I was coming from aft up forward.

Q. I show you this Exhibit A. Does this show where you were when the accident happened? A. That's right. Right there, near this hatch here. Right over here.

Q. Will you point it out on the picture? A. Right about over here.

Q. All right.

Mr. Fisch: Put the letter "R."

Mr. Parmer: I think it would be good, too. Let me see if we can get it in the
168 right place.

By Mr. Parmer:

Q. Do you want to put it down? A. Over here (indicating). Putting it this way, you'd have—I say underneath the boom. It's a little back further.

Q. You put the "R" to denote the place on deck where you were when the accident happened. A. That's right.

Q. You were proceeding, that is, facing in the direction where the winch was? A. That is correct. 169

Q. About how many feet aft of Caldarola were you when the accident happened? A. About three, four foot.

Q. Now, who were the other men who were working on this winch? A. I don't think I know the last names: Mike, Phil, Joey, Pete.

Q. There were three men working on this winch? A. Three men on the winch.

Q. Yes. The other men besides Caldarola were two? A. That's right, on the winch. 170

Q. Now, who were they? A. Phil Fagiano was on the steam. Paul Paganano was on the up-and-down.

Q. Are either of those men in court? A. I don't know. I don't see them here.

Q. At the place where you were standing when the accident happened, could you see those men? A. My men?

Q. No, Fagiano and Paganano. A. At that angle there?

Q. Yes. A. I didn't come on, look. I didn't expect anything to happen. I just had to watch everybody. I was just coming along. 171

Q. Do you mean by that that you did not see at that time what they were doing? A. Well, Fagiano, the man on the winch, don't shut the steam off at all. It continues to run all the time.

Q. The question, Mr. Russo, is simply this: Could you see those men at the time that the accident happened or couldn't you? One or the other. A. You probably could see the winchman, the steam man.

Q. Did you see him? A. Well, I didn't look
172 there.

Q. Did you see the man at the other niggerhead at that time? A. No, sir.

Q. Did you take any notice of what Mr. Caldarola was doing just before the accident? A. No, sir.

Q. Your attention was called to this when the boom broke? A. That's right, when it snapped.

Q. When it snapped? A. When it snapped.

Q. Were you observing what happened to the boom before it snapped? A. Before it snapped? I told my man it wasn't a strong boom.

Q. That is not what I asked you, Mr. Russo. I
173 want to know whether, before the boom snapped, you saw what was happening to the boom. A. Before the boom snapped I saw what was happening?

Q. Yes. A. I didn't see what was happening to the boom.

Q. Were you looking at the boom before it snapped? A. No, sir.

Q. Now, after the accident and after Mr. Caldarola was cared for, you went over to where this boom was in order to find out what caused the accident? A. That is right.

Q. And did you make an inspection of things
174 besides the boom? A. Anything else beside the boom?

Q. Yes. A. The main interest was the boom.

Q. Well, did you look at that portion of the boom which was still on the mast? A. I did.

Q. What did you observe about that? A. It was rotten.

Q. What did you observe about the metal? A. The metal? We looked at the whole thing. I guess probably it was twisted a little.

Q. Now, I want to show you this picture and ask

you if that was the picture of what you saw when you examined the metal part after the accident happened? A. Well, that is all I can say about the metal parts right now. I think it had that little twist. 175

Q. Will you answer my question? Does that picture show what you saw immediately after the accident, with respect to the metal part? A. I don't think I can answer you that question, unless you show me three or four pictures of the same thing here.

Q. Take a look at that Defendant's Exhibit C which is already in evidence; see if that helps you. A. What was the question again? 176

Mr. Parmer: Well, I think the stenographer will read it.

(Last question read.)

A. That's right.

Mr. Parmer: I ask that that be marked in evidence.

Mr. Fisch: We consent.

Mr. Parmer: All right. 177.

(Photograph received in evidence and marked Defendant's Exhibit D.)

By Mr. Parmer:

Q. Now, does that picture show the twist in the metal part which you referred to? A. That shows the twist.

Q. Do you also see this mark on the gooseneck? A. I do.

178 Q. Was that there at the time? A. I don't recall.

Q. You don't recall it? A. I don't recall if that little piece was there.

Q. You call that a piece. That is a mark, isn't it, a mark in the metal? A. It could have been put there after this boom cracked. My main interest was, what are we looking right over here? Right where that rotten part was, that was the main thing: How a thing like that could crack. It's rotten, if they leave a boom on there like that.

179 Q. Were you interested in finding out what caused the boom to twist? A. Well, probably when it come down, you know, anything can twist a little.

Q. Were you interested at all in determining what made that mark— A. No, sir.

Q. —on the gooseneck? A. No, sir. Could have been done after.

Q. Mr. Russo, I want to correct something which was probably an error. This place where this mark is, in Exhibit D, that is wood, isn't it? I referred to it before as metal. That is actually wood, and the metal part is this ring that goes around. Isn't that correct? A. No. That—

180 Q. Just to make it clear to you, isn't this gooseneck a pin which goes right through the wood? A. That's right.

Q. So that this place where the mark is is wood? A. I can't see it. No. I don't. I mean I can't see what is holding the boom then if that is a piece of wood. How could that pin hold the boom, this little piece there? I think that is a whole cup.

Q. You think that is a metal cup? A. I think so.

Q. On Exhibit D, we'll put an arrow leading to the mark that we are talking about. A. Yes.

Q. And put at one end the letter "M." A. What does that mean, M? 181

Q. Right? A. What does it mean?

Q. That is just a letter that we take to identify it. It doesn't mean anything in particular. You can take anyone you want. Mr. Russo, when you saw that twist in the boom at the gooseneck right after the accident, didn't you know at that time from your experience as a longshoreman that a twisting strain had been put on that boom? A. I am telling you, when the boom fell, it could have happened; anything could have happened. Doesn't have to be a twist that does it. 182

Q. There has to be a twisting at some time. A. It just happened, that's all, that twist.

Q. That is when the boom—your understanding was that, when the boom broke at the place shown in the photograph, while the cargo was suspended on it and the long part crashed to the deck, it hit Mr. Caldarola, the part next to the mast in some way got twisted in falling. Is that what you mean? A. Right.

Q. And the only distance it fell was the distance that it traveled through the air from the place that it was over the deck up against the mast? A. That ship was so old, I am surprised nothing else fell. 183

Mr. Parmer: I move that that be stricken out.

The Court: It may be stricken.

Q. And didn't you realize, from your experience as a longshoreman, Mr. Russo, that this mark shown in Defendant's Exhibit D was caused by reason of the fact that the boom had been forced up against the nut which you see on the top of the shackle? A.

If that boom went straight up in the air, it wouldn't
184 have the twist on it; it couldn't go near the nut.

By the Court:

Q. The question was, did you realize that, based on your experience as a longshoreman? A. I am telling you, what I was most interested in was the rotten part of the boom.

Q. Did you realize that on the basis of your experience as a longshoreman? Yes or no. A. I guess not.

185 Q. You say you guess not? A. I don't realize it at the time.

By Mr. Parmer:

Q. I want to point to that nut. This is the nut that we refer to. I am putting an arrow to it and we will put alongside the arrow the word "nut." That is the nut that you understand we were referring to? A. Yes, that's right.

Q. Do you know where either of those other men, Mr. Paganano or the man who was at the steam are now? A. Where they are now?

186 Q. Are they in New York? A. I don't know.

Q. Have you seen them recently? A. I saw one of the fellows about a week ago.

Q. Which one was that? A. Fagiano.

Q. He was at the steam? A. He was—no. He was the steam man, that's right.

Q. Do you remember a man by the name of Forti? Was he working in your gang? A. That's right.

Q. Is he here? A. I don't see him. I don't see him.

Mr. Parmer: That is all.
The Court: Any questions? 187
Mr. Fisch: No.

(Witness excused.)

The Court: Call your next witness.

JOSEPH R. RUSSO, residing at 63 Bay 14th Street, Brooklyn, N. Y., called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows: 188

Direct Examination by Mr. Fisch:

Q. Mr. Russo, are you the brother of the last witness? A. Yes, sir.
Q. How old are you? A. 22.

The Court: Keep your voice up. Talk up.

A. 22.
Q. And what work do you do at the present time? A. I am a crane driver, deckman, most anything 189 in stevedoring.
Q. Whom do you work for? A. I work for Jarka.
Q. You do not work for the same concern your brother works at the present time? A. Well, on and off I do.
Q. How many years experience have you got in longshore work? A. Longshoreman, two years; on deck, three years.
Q. What does that mean? A. I am a seaman. Merchant Marine.

Q. How long were you in the Merchant Marine?
190 A. About three years.

Q. Do you remember the day of the accident to Caldarola? A. I do.

Q. How long ago was that? A. I'd say about a year ago.

Q. Would you speak louder?

The Court: Can't you do any better than that Mr. Russo? Can't you talk up?

Q. What work were you doing on that ship? A.
191 I was on deck, relief man. I am supposed to relieve the other men. When they are on there too long, I just relieve them for a smoke.

Q. How long do they work before you give them relief? A. Half hour, an hour.

Q. And how long does your relief work take place? I mean, how long during the— A. Keeps going all around, go back to the first man.

Q. How many men do you relieve? A. There was four on deck. I think four men besides me.

Q. What hatch were you at? A. On No. 3, when it happened.

Q. Were you doing any work at the time the
192 boom broke? A. No, I was not.

Q. How far were you away from the boom? A. I was on the opposite—I was near the up-and-down, the niggerhead, standing there, watching that draft go out. In other words, I have a half hour off. I can stand around, do nothing.

Q. How near were you to Caldarola in feet? A. I'd say right in back of you there, at the end of the hatch.

Q. At the end of this— A. Just about there.

Q. —(pointing) partition? A. Yes.

Q. From where you are? A. Yes.

193

Mr. Fisch: That is something I am going to get.

The Court: We will have it in a minute. From the witness chair to the jury rail—

(Court Attendant measures the distance and announces, "Thirteen feet, six inches.")

By Mr. Fisch:

Q. Did you see the accident? A. Yes, sir.

Q. Tell us what happened, please. A: I was looking down the hold of the ship, as the draft come up. It was going at normal speed. When it got over the hatch on top of the deck, that is when the boom snapped; boom come down. I saw Pete on the floor. So I ran over to him. He was unconscious. That's all.

194

Q. This draft you told us about came out of the hold. Do you know where the square of the hatch is? A. Yes.

Q. How far away was the draft from the square of the hatch when this boom broke? A. I'd say right in the center of the deck, from the square to the outboard like where the rail is.

195

Q. We will start with one thing at a time. The square of the hatch was how many feet long and how many feet wide, about? A. I wouldn't know.

Q. Anyway, was it a square hold? A. A square hold.

Q. Now, the cocoa bags or beans contained in the bags were taken out of the hold by the up-and-down, is that correct? A. Yes, sir.

Q. Had the Burton boom taken hold yet when

the accident happened? A. Well, can I describe it?

196 Q. Yes, please. A. The draft came up on the up-and-down. When it came over with the Burton, she got on top of the deck. The up-and-down was slackened off the same time it was going even like that (demonstrating) when it hit on top of the deck, and that is when she went down.

Q. Had the Burton taken hold yet? A. Yes, it was dragging it in when it snapped.

Q. It was dragging in what direction? A. Inshore to the dock.

Q. Towards the dock? A. Yes.

197 Q. How many feet in your opinion had the Burton dragged or moved? A. It's not dragged, really.

Q. It was not on the deck, was it? A. No, it moved.

Q. Moved through the air, is that right? A. Yes.

Q. How many feet had the Burton moved this draft through the air when the boom snapped? A. I will say about five or six feet, got on top of the deck. It passed the hold. It was on deck.

Q. Did you examine the boom after the accident? A. I went to see what happened. I went over to the boom. I was looking at the piece right here that broke. I didn't look at the boom itself. I saw

198 where it broke.

Q. I mean the broken part. I meant to ask you that. Yes. A. I saw the part that was broken.

Q. What did you see? Tell us. A. I tell you the truth, it was like sawdust. I never seen a boom on any ship like that. I had a hook in my hand. I just picked it out like that. It kept falling like sawdust.

Q. You just picked, what? A. I was just picking out the wood, like that.

Q. With the hook? A. Yes.

Q. You say it was falling out like sawdust? A. Yes, it was. 299

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Did you follow the course of this draft— A. As it came out of the—

Q. I hadn't finished my question, Mr. Russo. Did you follow the course of this draft from the hold, as it went up in the air and as it went over towards the side of the ship up until the time the accident happened? A. Yes, sir. I followed that draft perfectly. 200

Q. And while you were following the course of the draft, did you observe what the winchmen were doing? A. I was looking all around. They were doing the right thing. I was myself looking at the draft too. I was looking at the draft, just looking all around, winchmen and all.

Q. While you were looking at the course of the draft, could you also keep your eyes on the winchmen? A. No.

Q. Did you see anything happen to the Burton boom before it broke? A. No, sir. 201

Q. Were you looking at it? A. As the draft was coming up?

Q. Were you looking at it just before the accident happened? A. No, I never noticed anything.

Q. What I asked you was this: Just before the accident happened were you looking at the Burton boom? A. No, sir, I was not looking at it.

Q. You can't tell us then, can you, whether the Burton boom was drawn up so that it was almost in a line with the mast? A. The Burton boom?

Q. Yes. A. How do you mean? I don't know
202 what you are talking.

Q. Well, just to illustrate, assuming that is the mast (indicating) and that is a boom (indicating), can you tell us from what you saw there whether the boom was caused to go up and assume that position? Do you know? A. Yes. The boom would not go up that way.

Q. What? A. A boom wouldn't go up in the air.

Q. I didn't ask you whether it would or not. Did you see that happen? A. Did I see it go up in the air? No, sir.

203 Q. Were you observing closely enough so that you can tell us whether that happened or not? A. Yes, sir. I can tell you it did not happen.

Q. You are telling us it did not happen? A. The draft came up with normal speed. Nothing was jerked or anything. The boom just cracked. If he jerked it, the boom had to crack. The up-and-down would have broke up.

Q. Would you say that again? A. If he jerked altogether like that, everything would have broken, but the draft was coming up at a normal speed. Nothing was jerked.

Q. When you said, if he jerked, you put your
204 hands, your clenched hands together like that, didn't you? A. Like this here (indicating).

Q. What you are trying to illustrate there is that if the Burton boom and the up-and-down fall began pulling against each other, isn't that what you mean? A. At a certain speed, it would jerk up good and hard, but it was in the air. There was no jerking going on. If was just going at a normal speed and just dropped right there. He couldn't have jerked it.

Q. Just let us answer the question. When you put your hands like that,— A. Yes? 205

Q. —you mean if one fall pulls against the other, don't you? A. Yes, sir.

Q. And if one fall pulls against the other, the draft goes up in the air? A. No, it does not. This fall ain't going to pull against the other one. You pull on this fall, this fall stays the way it is (demonstrating). You pull on the Burton fall, it comes over like this, see (demonstrating)? It does not pull away from nothing.

Q. If the two falls pull against each other, you tell us that the draft would not go up in the air, 206 and do you also tell us that the boom would not go up in the air? A. You said the boom would go up in the air like this (demonstrating). You have a draft on the boom. When there is a heavy weight on the boom, it can't jump up, if you have got your weight there. I never seen a boom go up in the air. I seen a boom go this way and that way (demonstrating).

Q. You are telling us now that it couldn't happen? A. It couldn't go up in the air.

Q. That is what I mean. A. That's what I am trying to say.

Q. Did you also see the condition after the acci- 207 dent, shown in this Defendant's Exhibit D, of the twist in the boom at the place where it joined on the mast? A. This twist right here on top, where the pin is?

Q. You are turning to the twisted place. Yes. A. I noticed that, yes, sir.

Q. Did you also notice this mark to which an arrow points and the letter "M"? A. No, sir.

Q. Did you know a man by the name of Forti who was working there that day? A. Yes, sir.

Q. Wasn't he the relief man?' A. No. Mike
208 Forti is a gangway man.

Mr. Palmer: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Fisch: Then we offer in evidence, without objection from my worthy opponent, both records, both hospitals.

(Hospital records of the St. Peter's Hos-
209 pital received in evidence and marked Plaintiff's Exhibit; Dr. Spalding's record received in evidence and marked Plaintiff's Exhibit 3.)

Your Honor, I think I have run out of ammunition.

The Court: Ladies and gentlemen of the jury, by reason of the meeting of the Board of Justices, set for 2 o'clock, we will adjourn court until 10 o'clock tomorrow morning.

Do no discuss the case among yourselves nor permit anybody else to discuss it with
210 you and do not visit thhe scene of the accident.

Please be in your places promptly at 10 o'clock tomorrow morning, Trial Term, Part VI, Room 331.

(Whereupon an adjournment was taken until Wednesday, June 6, 1945, at 10 A. M.)

Wednesday, June 6, 1945.

211

TRIAL RESUMED.

(Same appearances.)

The Court: As I understand it, Mr. Fisch, you will rest your case now except for your medical?

Mr. Fisch: Yes, your Honor.

The Court: We are having a little difficulty with the doctor. One will be here at 11 and one will be here at 12.

212

Mr. Parmer: Except for the plaintiff, calling the plaintiff on the plaintiff's case for the purpose of testifying in connection with the model.

The Court: The plaintiff will be recalled on the plaintiff's case.

Mr. Fisch: He will be here in a few minutes.

The Court: All right.

Mr. Parmer: Shall I wait for him, your Honor?

213

The Court: Just as you please.

Mr. Parmer: I'd prefer to wait for him and get through with that, your Honor.

(Recess declared.)

The Court: Mr. Parmer, I think you had better go on with your proof. We cannot wait too long.

Mr. Parmer: Very well

214 The Court: You are going to reserve your motions till the close of all the plaintiff's evidence?

Mr. Parmer: Yes, your Honor.

The Court: All right.

DEFENSE

SERGEJS BOLS, of 19 Rector Street, New York City, c/o Thor Eckert, called as a witness in behalf of the defendant, being first duly sworn, testified
215 as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Bols, are you a—

Mr. Fisch: Sergejs.

The Court: Bols is the first name.

The Witness: No.

Q. The first name is Sergejs? A. That is right.

Q. Are you a Master Mariner? A. That is right.

Q. And are you captain of some vessel now? A.
216 Yes.

Q. What vessel are you captain of?

The Court: You will have to do better than that, Captain. Speak up so that gentleman there in the gray suit can hear you. Way up, now.

A. Panamanian Steamship Everagra.

Q. That is the vessel that we are concerned with in this case, is it not? A. Yes.

Q. Who employs you? A. War Shipping Administration. 217

Q. Where were you born, Captain? A. I was born in Russia.

Q. What part of Russia?

By the Court:

Q. Sit back, Captain. How do you give orders at sea? Let me hear how you give orders at sea. If you want a fellow to go aloft, how do you do that? A. I did not—

Q. How do you order a man aloft? You do not say, "Go aloft," do you? A. Oh, no. 218

Q. You say also, "All hands on deck." Let's have that kind of talk. A. I was born in Russia, in Pomel.

By Mr. Parmer:

Q. What part of Russia is that? A. That is in the middle way, Russia.

Q. Now, were you on board the Steamship Everagra when the accident happened to Mr. Caldarola? A. Yes, I was on board ship.

Q. Had you been on that ship during the day time? A. Yes, I mean I slept during the night aboard the ship. I didn't left the ship that day. I was on board the ship when this accident. I was in my cabin that time. 219

Q. Were you in your cabin when the accident happened? A. Yes.

Q. During the day, had you been out on the deck in the region of No. 3 hatch? A. Yes, I walked past many times.

Q. Now, since you have been in New York on

the first occasion, have you seen this model which
220 is before us in court on the table? A. I saw it yesterday.

Q. Did you take part in making any of the measurements of the ship as a result of which this model was made thereafter? A. Yes, sir, with my chief officer, together.

Q. Did you make the measurements with the chief officer? A. Yes, sir.

Q. Who was present when the measurements were made? A. This gentleman.

Q. That is Mr. Jorda? A. Mr. Jorda.

Q. Same office as the office of the attorneys for
221 the defendant?

Mr. Parmer: Your Honor, I will prove in due course that this is made to scale, but for the moment, I will omit that. I have to connect it up.

Q. Does this model show the constructions of the booms and the hatches? A. Yes, sir.

Q. And the places where they are on the Everagra at No. 3 hatch? A. Yes.

Q. As they were at the time of the accident? A. Yes.

222 Q. During the morning of the accident, did you observe the manner in which the booms were rigged, and so forth while the longshoremen who were there at that time were working? A. Well, I looked, but I never paid much attention to that, because that is officers'—

Q. What? A. My deck officers, they usually take care of those things.

Mr. Parmer: Captain Bols, will you come down here, because I want—

The Court: I want to call your attention to the fact that the plaintiff is back in court now, Mr. Parmer: If you'd like to suspend with this witness, you may do so. 223

Mr. Parmer: Thank you, your Honor, I would. I'd like to get the plaintiff to give his testimony first.

The Court: You may suspend with this witness. The plaintiff is recalled. Have a seat, Captain.

(Witness temporarily excused.)

224

The Court: All right, recall your plaintiff, Mr. Fisch.

(Plaintiff's case, continued)

PETER CALDAROLA, recalled on the plaintiff's case, testified further as follows:

Cross Examination by Mr. Parmer:

Q. Mr. Caldarola, would you stand right here so that you can see this and also this juryman over here won't have his vision interfered with? Mr. Caldarola, this the Captain testified is a model of the ship, and it has been constructed to scale, which we will prove later, with the two king posts, two booms, guys holding the booms, the hatch, and this device here which I point to represents the winch; see the hatch coaming here? A. Yes. 225

Q. Here is the rail of the ship which was nearest to the dock. A. Open rail.

Q. It was an open rail on the ship? A. Open rail.

Q. With that difference, does it look natural to
226 you? A. No.

Q. Wherein does it seem to be out of line? A. The king posts.

Q. Yes? A. That is in further of the drum head.

Q. It was in further? A. Yes, sir.

Q. Closer to this here? Is there anything else? A. That is all. The king posts as close way in to the drum.

Q. You mean closer to this structure? A. Structure—this structure is too big. It's way in a little further.

227 Q. I see. A. The king posts come here.

Q. I see. A. And on this one here.

Q. Do you notice the picture? Do you, Mr. Caldarola? I will call your attention to Defendant's Exhibit C. A. Yes, sir; you see it right behind the drum, the king posts. This is outside the drum.

Q. This thing moves, Mr. Caldarola, when you get it—it's owing to the fact that it's slippery; it slips every so often. When you get it off even on each side, you will notice the drum is in line with the king post (demonstrating with model).

The Court: Have you offered that in evi-
dence yet?

228 Mr. Parmer: This model, I have not, your Honor. I was just about to do it.

Mr. Fisch: No objection.

Mr. Parmer: May I offer it subject to connection?

The Court: All right.

(Model received in evidence and marked Defendant's Exhibit E.)

Peter Caldarola—for Plaintiff—Recalled—Cross.

By Mr. Parmer:

Q. Now, Mr. Caldarola, that we have adjusted this little device here so that it is even on both sides, does it now seem natural to you? Yes? A. Yes.

Q. Very good. Would you mind marking on the model the place where you were standing at the time the accident happened? Put an "X", please, or anything that you want.

(Witness marks the model.)

Q. Would you put a circle around that X, please? Will you do that with red pencil so we'll have no—

(Witness marks with red pencil.)

Q. Now, was the boom which hit you just before the accident in about the position that is shown on this model now? A. Not before the accident, the boom didn't hit me.

Q. You misunderstood what I intended. I want to know whether before the accident the boom was in the position which is now shown on this model. A. No, sir.

Q. In what way did it differ? A. Furthermore, this way.

Q. How much further would you say? Just show the jury how much further. A. This way (demonstrating).

Q. That is about two inches. That is the toe of the boom? A. Yes.

Q. The end of it was about two inches more to the forward part of the ship? A. Forward part of the ship, right.

Q. Forward part of the ship? Now, when the
232 boom broke, did the boom go in this place between the winch and this structure which was between the two posts, the two masts? A. I couldn't explain that. Even a dead man couldn't explain a thing after he is dead. I was knocked unconscious, laying there. How can I tell you that?

Q. You have to say you don't know. A. I don't know.

Q. Very good. You recall yesterday, Mr.—

Mr. Fisch: "You remember."

Mr. Parmer: Excuse me.

233

Q. You remember, Mr. Caldarola, yesterday, that you said, with respect to Exhibit A, that this boom which we see in the picture and which is between the winch and this structure was not the boom which fell down but that was the new boom? A. On account of the riggin' there, it was not the same riggin' as the other picture there, because they have got the other part higher there. You can't see the new one or the old one, but on account of the riggin' there, that is a new riggin', a new boom, that has been in the picture.

Q. That is a new boom? A. On account the
234 riggin' is different riggin'.

Q. You have no idea, Mr. Caldarola, what part of this boom hit you? A. No.

Q. You do have one? A. Yes.

Q. Will you tell us what your idea is? A. Right about here.

Q. We'll mark it.

The Court: A straight line in red pencil.

Q. Straight line in red pencil at the lower end of the boom. Now, do you mean that it was the upper portion of that boom divided by this red line which hit you? A. About. About. I didn't have no rule, or anything like that. About, about this direction. 235

Q. What I mean— A. It is right over my head; this boom was swinging over here and where I am standing the boom was going right over my head.

Q. Mr. Caldarola, what I want to know— A. I mean exactly all I can say, the boom was swinging right over my head to the dock. 236

Q. I want to find out what you mean when you say you have the idea of what hit you. You see, when the boom broke, it divided into two parts. One was the lower or very short part— A. Right.

Q. —and one was the long part above it. Was it your idea that it was the long part above that hit you or the short part below that hit you? A. I don't know.

Q. You don't know? All right. You didn't see where the broken portions of the boom went? A. No, sir, I was knocked right out in a second.

Q. Do you know, have you got any knowledge that the boom hit you at all? A. Well, in the meantime, I was like a—after I got hit, the boom was over my head. 237

Q. When the boom fell, there were some wires attached to it which fell too, weren't there? Weren't there some wires attached to the boom, which fell at the same time as the boom? A. I don't know. I can't explain that. I was knocked out.

Q. You don't know whether the wires hit you or the boom hit you, do you? A. I "prefer" that the boom which was over my head.

Q. You lean towards believing that the boom
238 hit you? A. Yes, sir.

Q. But you don't know, is that right? A. No.

Q. Mr. Caldarola, do you remember that while you were standing at this place marked "X" on the model— A. I was standing, because when we work we clear all our feet—

Q. Maybe you don't understand me. You see this point marked "X" here? Before the accident that is where you were standing, is that right? A. Yes.

Q. Now, while you were standing there, do you
239 remember that the gangway man, Mr. Forti, shouted to you, warned you that an accident was going to happen, and that you stepped back here where I am pointing to now? A. No, sir.

Q. Don't you remember that it was while you were back here, that is, aft of the mast, that you were hit with something? A. No, sir. Nobody warned me. The draft, when it got up this direction here, it went down in less than a second and I got hit and knocked unconscious.

Q. Don't you remember that you sat down on a hatch which was aft of this mast that I am pointing to here, the mast on the starboard side? I
240 will show it to you in the picture, Defendant's Exhibit C. A. I was—when I come out of the "conscious," I was up—they carry me up against the bulkhead here, not this here (indicating), up against the bulkhead; way out there, they carry me.

Q. Don't you remember that the Captain came out? A. No, sir.

Q. —while you were sitting on the hatch, and talked to you? A. That is a liar.

81

Peter Caldarola—for Plaintiff—Recalled—Cross.

Mr. Parmer: That is all, Mr. Caldarola. 241

(Witness excused.)

Mr. Fisch: *Please go back for a minute.* I have a question to ask of you.

Mr. Parmer: You want him to go back?

Mr. Fisch: Yes, please.

(Peter Caldarola resumed the stand.)

Mr. Fisch: Your Honor, there is a question I omitted to ask on direct.

The Court: Go right ahead.

242

Direct Examination by Mr. Fisch (Continued):

Q. Mr. Caldarola, did you have any trouble with your neck before the accident? A. No, sir.

Q. Have you noticed anything about your neck since the accident? A. Yes, sir. Through the doctor, explained me the accident.

Q. Outside of the doctor "explaining you," what can you see about your neck? Can you turn it? A. No, it's stiff, and pains.

Q. Where is the pain? A. Right over here.

By the Court: 243

Q. Indicating the right side of the neck? A. All this part here pain.

Q. Indicating on the head. A. And down in my back here (indicating).

By Mr. Fisch:

Q. You had never had any trouble with that before the accident? A. No, sir.

(Witness excused.)

The Court: All right, Captain Bols.

244

SERGEJS BOLS, resumed the stand and testified further as follows:

Direct Examination by Mr. Parmer (Resumed):

Q. Now, Captain, using this model, Defendant's Exhibit E, would you explain to the jury how the booms and the dericks are used in taking cargo from the hold and putting it over the side on to
245 the dock? If you need any assistance from my hands in holding, let me know and I will be glad to do it. A. There is only two derricks at these hatches, two derricks and one winch with two niggerheads. Instead of wires, the stevedore used three and a half inch manila ropes, and these manila ropes were spliced. They were not spliced together, but each one, both connected in this place together.

Q. In other words, these are the cargo falls? A. That is the cargo falls.

Q. And they are called married falls? A. Married falls.

246 Q. Tied together but not spliced? A. Not spliced, no. They are spliced, each one of them.

Q. Individually are spliced? A. And then they are connected with the shackle.

Mr. Fisch: What?

Q. What is a shackle? A. A shackle is—

By the Court:

247

Q. A block, isn't it? A. No, it is not a block. It is—

The Court: Isn't there one on the picture?

The Witness: Yes, there is on the picture.

Q. Point it out on the picture. That is the easiest way. A. (Indicating) This is a shackle.

By Mr. Parmer:

248

Q. Yes. A. That's it.

The Court: Show it to the jury. You may point it out, Mr. Parmer, to the jury.

Q. It has a pin that goes through it? A. A pin goes through it.

Q. And that is shown on Exhibit D? A. These two cargo falls are held together by means of such a shackle. I forgot to mention every time when a ship arrives in port, ship's crew hoisted the derricks up right in the middle and leave in the mid- 249
dle of the ship; and every time, before starting discharging or loading, stevedore men rig the derricks and falls the way they start to discharge. Then they discharge. In this case they used two men, one man at the steam valve in the middle here and one man, one niggerhead, and another man at another niggerhead with the falls. Well, one of the derricks is usually in the middle of the hold in this case.

Q. That is called the up-and-down, isn't it? A.
250 Up-and-down, yes, like on board my vessel, it's hard to put this derrick right in the middle of the hold because the Sampson post is short and the derricks are short too.

Q. When you say this one, you mean— A. It was a little bit on port side more.

Q. You mean—I want to know for identification purposes—you mean the one on the port side? A. Yes, the Sampson post on port side, and it was made fast with one guy. That is a guy and "preventet" here—wire "preventet" to the railing, and another guy, another side on the first bridge near
251 the derrick was fast. In other words, this derrick was tightened up from both sides. The other derrick was outside.

Q. Now you are speaking of the derrick? A. We call them derricks.

Q. The derricks on the starboard side? A. Starboard derrick was as far outside as it's possible to go. I don't remember exactly how it was, but usually on my ship it is nearly about 80 degrees from this line, otherwise the slings wouldn't go overboard.

Q. Why is that? A. Well, because is short der-
252 rick. It's quite far away from a ship's side.

Q. How long is this derrick on the starboard side, I mean the boom itself? A. As I remember, it's about 20, 22 feet, something.

Q. Twenty-two? And do you recall what the distance is from the Sampson post to the side of the ship? A. No, I don't recall the distance.

Q. Now, I want you to go on and explain to the jury how you transferred by means of this equipment cargo from the hatch and over the side of the vessel on to the dock? A. Well, this case—

Q. Yes? A. The first thing, the man at the port niggerhead starts to heave cargo. I mean winch was working all the time straight, all the time steam on, and winch was working. 253

Q. Let me interject something there. That is, by winding up this fall on this drum here— A. On this drum.

Q. —on the port side, the cargo is made to go up first? A. To go up, and in this case it got up.

Q. I do not want you to tell what happened at the time of the accident. A. Oh.

Q. I just want you to tell in the ordinary course, cargo was transferred from the ship to the side, 254 to the dock. Now we have got the cargo up out of the hold by means of this port winch. What next happens? A. The next thing, men on the starboard niggerhead, yes, he starts to heave the slack.

Q. And this man lets go? A. At the same time, this man not let go, but have to slack easily.

Q. Slack easily? A. Not to let go right away, otherwise this cargo will hit somewhere here on deck and can have some accident. This have to slack and this have to "easily" up.

Q. Yes? A. When it's over the rail bulkhead here, this man lets go his fall. 255

Q. He lets go? A. He lets go this fall, and this man starts to slack down.

Q. Now Captain, while you were in your room, did you hear of an accident that happened? A. I did not hear when it happened right away. Somebody shouted. I mean, my doors were open, both sides, my doors from my—there's my doors, is here, a little passageway.

Q. What do you call this place on the ship? A. Is a bridge, first bridge.

Q. First bridge? A. Over here.

256 Q. That first bridge on the model, Exhibit E, is shown by this structure at the forward end of the ship; that is the block wood at the forward end of the model? A. My cabin doors are here.

Q. So your cabin door fronts right on No. 3 hatch? A. Yes, right in front a little bit on the starboard side, like it's here (indicating). It is not right—my cabin, there is a little passageway; on the left side is a saloon, and on the right side is my cabin.

As soon as this accident happened, somebody
257 shouted,—I don't remember who was it—that there is an accident: A boom break down.

Q. What did you do? A. I run right away outside here, and the first thing I see is my carpenters, also, later, you know, there was boatswain and my mate. First thing I told him, not to touch anything. I asked if there is anybody hurt. Then I saw one stevedore, you know.

Q. Where did you see him? A. I saw him, see, there's two small bunker hatches. I saw him near the first bunker hatch, and there was near—

Q. I want to call to your attention this Defendant's Exhibit C. Did the bunker hatches that
258 you refer to appear upon that picture? A. Yes. There's one and there's the second bunker hatches.

Q. Now, we will mark—that is one of the bunker hatches? A. Yes.

Q. We will put a "1" on that one, and this is the second bunker hatch? A. Second, yes.

Q. We will put a "2" on that. Is that correct? A. Yes.

Q. Where did you see this injured man? A. I saw this man a little bit in this place, about.

Q. Where you are pointing now? A. Yes, it was two men, one man on each side of him, and—

Q. What was he doing? A. He was walking. They were holding him and he was walking over there, and I asked them to— 259

Q. Never mind. We want to get down where you saw him. A. Yes.

Q. Is this the place, right there? A. About the end of one hatch.

Q. That is the after end? A. The after end.

Q. We will put an "X" right there. That is where you saw him, right? A. Yes.

Q. Two men were with him? A. Well, there was lot of men around, but I noticed specially those two men on each side. 260

Q. Did you say this injured man was walking? A. Yes.

Q. Well, where did he walk to? A. I asked them.

Q. No; I want to know where did he walk to. A. Well, they was here, this way.

Q. You mean walking from "X" over towards No. 2 hatch? A. Yes.

Q. And will you tell us where you saw them go? A. No. I asked them—I told them I want to inspect that man. I want to see if I can help anything, to give some medical attention to him; and I asked him to let him sit down on this hatch. 261

Q. You mean No. 2 hatch? A. No. 2 hatch.

Q. Is that what happened? A. Well, then, first thing, I asked him if—

Q. No. I want to know, did he sit down on No. 2? A. Yes. Yes.

Q. What did you do then? A. Well, I asked him if he is hurt.

Q. Yes? A. He was holding—I don't remember right or left hand—somewhere here on the head (indicating).

Q. Yes? A. Well, I took the hand off and I
262 looked all over.

Q. Yes? A. There was no blood. Possibly, maybe there was a little scratch, but I don't remember any more that, but there was no blood, and nothing serious.

Mr. Fisch: We move to strike out the word, "nothing serious."

Mr. Parmer: Well, apparently serious.

The Court: Yes, I will strike it out.

Mr. Parmer: Now, may I show this to the jury, your Honor?

263 I will just explain these marks. There is the No. 1 hatch. There is the No. 2 hatch. "X" is the place where the Captain says he saw him first, and that he walked over from "X" to No. 2.

A Juror: What is the distance?

By Mr. Parmer:

Q. What is the distance between that place on the photograph marked Exhibit C from the place that you marked the "X" over to that No. 2 hatch to which the man walked, approximately? A.
264 About ten feet, 12 feet. I, really I can't say exactly.

Mr. Parmer: Your Honor, another juror has told the officer he wishes to know the distance.

The Court: Let him ask the question. All right, the juror wants to ask a question.

The Juror: Yes. How far is No. 1 to No. 2?

By the Court:

265

Q. Will you answer that question, Captain, from No. 1 hatch to No. 2?

The Juror: Whatever they call it.

A. Well, I really can't say exactly.

By the Juror:

Q. Approximately. A. But it's about 10, 12, or 15 feet, or something like that.

By the Court:

266

Q. Not less than 10 nor more than 15 feet? A. I can't say exactly.

By the Juror:

Q. But no more than 15 feet, no less than 10? No more than 15 and no less than 10? A. I can't say exactly that.

By Mr. Parmer:

Q. While Mr. Caldarola was at No. 2 hatch, did you talk to him? A. Well, I asked him where, 267
tell me if he is hurt, does he have any pain, or anything.

Q. Did he speak to you? A. I don't remember exactly, but I spoke to him, but the other people—

The Court: Can the witness go back to the chair now?

Mr. Parmer: Yes, I believe so, your Honor.

The Court: All right, come back, Captain.

(The witness returned to the witness
268 chair.)

By Mr. Parmer:

Q. At the time that you were talking to him, was he awake or asleep? A. No, he was awake. He was—I didn't see—he was holding his hand to the head, somewhere, but he was all right otherwise.

Q. And how long thereafter did he remain on the ship, this injured man? A. Well, I can't say exactly that because after inspecting him and look-
269 ing him over, I told him, the mates, to watch everything. I ran right away to the shore and called my office and informed. I don't know. He was on board ship.

Q. Did you make any inspection of the ship? A. Well, after I came from phone, first thing I looked over ship's gear, shackles, wires, and everything; and everything was in very good order; was nothing broke from ship's gear.

Q. Did you examine the broken boom? A. Oh, yes.

Q. What did you observe with respect to the
270 parts of the broken boom? A. Well, I found the wood, all wood in very good condition, in perfect condition.

Q. What did you find with respect to the gooseneck? A. The gooseneck was bent.

Q. I show you this picture, Captain, which has not been marked yet. Does that show the gooseneck in the lower portion and the broken boom as it was after the accident? A. Yes.

Mr. Parmer: I ask to have this marked, please.

Mr. Fisch: No objection.

271

(Received in evidence and marked Defendant's Exhibit F.)

By Mr. Parmer:

Q. Now, Captain Bols, I want you to look at this Exhibit F and point out the portion of this gooseneck which is metal and the portion that is wood. Just point it out and we will mark it later. A. Well, metal goes from here, this (indicating). This part, this part here in front, this part is wood.

Q. Here at the upper portion of the picture, 272 show me where the metal is and where the wood is. A. This is border between wood and metal.

Q. That is the border? A. Yes.

Q. That is sort of a half moon? A. Yes, and this is all metal here.

Q. Now, let us draw something which shows the —I will draw one arrow pointing to the metal portion and put the word "metal" on that arrow; and another arrow pointing to the wood portion with the word "wood" alongside that arrow. Now I will draw another line along the dividing line between the wood and the iron.

273

Mr. Fisch: Draw a line between both.

Mr. Parmer: If I do that, it will obliterate what the picture shows, which I do not want to do.

By Mr. Parmer:

Q. This ring portion here, this ring showing around the wood, is that metal too? A. That is metal.

Mr. Parmer: We will put an arrow to
274 that and put the word "metal."

Q. And the ring at the bottom, that is metal? A. Also metal.

Mr. Parmer: I will put an arrow to that, the word "metal."

Q. Now, did this gooseneck have any arms coming down the outside? A. On both sides.

Q. Can you see any parts of those things in the photograph? A. No, I do not see any; possibly it
275 is by the end there.

Q. What is on there? A. That is wood.

Q. That is wood? In other words, there are strips of metal coming down the sides— A. Yes, sir.

Q. —as I draw there? A. Yes, on both sides.

Q. On both sides.

Mr. Parmer: And I will put "metal" along those lines, denoting where that metal is.

Q. And this portion here that I am pointing to
276 now is the wood? A. It's wood.

Q. Very good. We will put "wood" there.

(Defendant's Exhibit F shown to the jury by Mr. Parmer.)

Mr. Fisch: Your Honor, may we suspend? It seems that both doctors are here now. They want to get away as soon as possible.

The Court: I want to oblige the doctors. Have you much more with this witness? 277

Mr. Parmer: I don't have much more, except that it is a long process, you know, explaining this.

The Court: Well then, we will withdraw him and let Mr. Fisch finish his case. You may step down, Captain.

(Witness temporarily excused.)

Testimony of Drs. Patella and Leiner omitted. 278

The Court: The plaintiff rests?

Mr. Fisch: Yes, the plaintiff rests.

Mr. Parmer: Your Honor, I want to make a motion. I do not know whether I should make it in front of the jury.

The Court: Make it in the presence of the jury. State your grounds.

Mr. Parmer: I move to dismiss the complaint in this case on the ground that there has not been sufficient evidence of negligence or a cause of action proved against the defendant partnership known as Thor Eckert. 279

I move, first, on the ground that there has been no proof offered as to the orders and regulations issued by the United States pursuant to the provisions of the general agency contract which has been evidence and on which reliance is placed by the plaintiff in order to make out an alleged cause of action against this defendant. That contract, and particularly Section 14 thereof, on which I am told that reliance is placed

by the plaintiff, is predicated definitely on
280 orders, regulations, and so forth, being issued by the United States. It is the plaintiff's burden to prove that there was a violation of duty by this defendant. It was the plaintiff's burden to prove those duties, if the contract is relied on; to prove those duties; the regulations, and the orders must be proved as well.

I also move to dismiss the complaint on the ground that there has been no proof or evidence in this case that these defendants,
281 that is, the partnership, had anything to do at all with supplying or furnishing the equipment, to wit, the boom or any other equipment on board this ship, to the plaintiff or to the longshoring organization for which he worked as of the time of the accident.

I specifically submit to your Honor that the contract which has been put in evidence is not sufficient to prove that this defendant furnished this equipment to the plaintiff. There is no other evidence of negligence.

282 The Court: Suppose we excuse the jury.

We will excuse the jury till two o'clock. Do not discuss the case among yourselves nor permit anybody to discuss it with you, ladies and gentlemen. Be back in your seats at two o'clock. Do not visit the scene of the accident.

(Jury departed from the courtroom.)

Mr. Parmer: I just want to add to that ground, your Honor, that there is no proof

of any control or occupancy of the premises, that is, this ship, on the part of this defendant. 283

The Court: What have you to say on that, Mr. Fisch?

Mr. Fisch: Well, the letter which I have attached to the pleadings is an admission of the fact that they are the general agents. Is that correct, Mr. Parmer, that the defendant is?

The Court: You are referring to the letter of May 8, 1944, which states as follows: 284

"This will confirm conversation between you and our Mr. Parmer in which we said that the answer which had already been filed on behalf of the Gerda Eckert and Thor Eckert, Jr., was not intended to deny that the partnership of Thor Eckert & Company were general agents of the United States pursuant to a G. A. contract. Very truly yours, Kerlin, Campbell, Hickox, Keating & McGrann, by Mr. Parmer."

Mr. Fisch: With that being in the record, then, we say to your Honor that we have shown a condition where the wood constituting the boom was rotten, where pieces came out, or portions of it like sawdust; and under the decisions which we handed to your Honor, no notice of this condition is necessary, if it could have been discovered previously. The decisions that I submitted to your Honor have to do with ropes and chains and also wood, as in the Brady decision. That is all the evidence there was in the Brady decision, that somebody saw the stair- 285

way that the Customs Guard Brady walked
86 down on was rotten. It's exactly the same.

The Court: It is the case in which the Customs guard was killed. The ladder broke.

Mr. Fisch: The ladder broke, like here, the boom broke. There isn't much difference in that.

We contend, in view of all the decisions that we gave to your Honor, there are about ten Judges to one, and the Brady decision; and one more important thing, while we are speaking for record: This is a contract made
87 under a Federal regulation. It is made either under the Federal law as the United States Supreme Court has stated in the Brady decision or made pursuant to an order which the Administrator of Shipping had pursuant to that Federal law. At all events, it is a Federal question, and we contend to your Honor that, while we say that all the decisions of this State say that an agent who fails to repair is guilty of misfeasance, we yet say that it has no application to this question, because it's a Federal question. And we submit to your Honor
88 this proposition:

When a Federal question is involved, we then must go to the restatement of the law of agency as it exists throughout the United States, in the absence of Federal law, although in this case we have a Federal decision, which is the Brady case; but, in assuming we didn't have that Brady decision, then we have a restatement of the law of agency. We submitted to your Honor the restatement of law of agency in our brief,

and I will say the statements of one text writer, Mechem, who is considered quite 289
an authority as to what the law is in the United States, and we submit that at the present moment, there is surely evidence of negligence sufficient to submit to the jury, and at this time the motion to dismiss should be denied.

The Court: As I understand Mr. Parmer's motion, he is moving to dismiss the complaint on the merits. Before we get that far, I would like to ask you this: There is a question in my mind whether or not you 290
failed in the proof, not with reference to a dismissal on the merits, but with reference to whether or not you failed to make out a case by reason of a failure of proof, a failure of proof, and whether he is not entitled to a dismissal without prejudice by reason of the following circumstances—maybe you can convince me. You rely on Article 14 of the contract, do you not?

Mr. Fisch: Yes, sir.

The Court: All right. Now, that places on the general agent, as I read it, the duty of arranging for the repair of the vessels 291
as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. Now, this duty is imposed on the general agent subject to such regulations and instructions or method of supervision and inspection as may be required or prescribed by the United States.

Have you proven the regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States?

Mr. Fisch: It is not necessary, for this one reason—

The Court: Well, do you admit you haven't proved it?

Mr. Fisch: We admit that.

The Court: Now, you say it is not necessary to prove it?

Mr. Fisch: I will tell you why, your Honor.

The Court: All right.

Mr. Fisch: That is something for them. If they say that anything took place that varies the terms of this contract which is in evidence or modified the instructions, it is for them to prove, because we stand on this contract at the present time. In the case of Quinn, which was decided by the Circuit Court of Appeals in this Department, where the defendant came for work and showed that a certain amount of control was taken away from it by reason of these regulations, the Quinn decisions held that the defendant—

The Court: What case in your memorandum?

Mr. Fisch: This is on page 10 of a supplemental memorandum of law. That is where the Court spoke in the Quinn case at page 191.

"Even if the Maritime Commission selected the officers, as appellant contends, the appellant was not ousted of control. It was the appellant that came forward with these regulations and with the proof to show that they had nothing to do with hiring the crew and the officers, and yet the Circuit

Court of Appeals said, taking the whole contract, not only one portion of it, the defendant was not ousted of a measure of control." 295

Now, I think we ought to put this in:

"Common sense and the precedents make the applicant liable on the facts in this case. It had almost substantial measure of control over the operation of the vessel. It was paid to manage, operate, and direct the business of the line"—which is our contract here.—"The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the owner did substitute itself as manager either generally or at the time of this accident." 296

There is no showing. They have got to show that. The burden is upon me to show that they were ousted of control under that contract. The burden is upon them to show, if they say they have no control over the 20 articles. Let them show it, and then we come forward with other proof.

I think those two cases, the Quinn case especially, which was cited with approval in the Brady decision in the Supreme Court— 297

The Court: Have you got anything to say on that point, Mr. Parmer?

Mr. Parmer: Yes, I have, your Honor. I call your attention, your Honor, to the fact that in the Quinn case and the Brady case, there was a different contract from the contract which we have here. In that contract, the duty was placed upon the general agent

to man these ships. From that duty of manning the ships, which was specifically set forth in the contract, an inference of control of the ships was taken by the courts. When the inference of control was once taken, then it became the duty of the person in control to show that their control was restricted and limited by reason of subsequent orders, and so forth, from the United States. And that is the meaning of the C.C.A., and it is the decision in the Quinn case to which reference has just been made by Mr. Fisch.

In this contract, which was made after the Quinn case had been decided, and in view of war conditions, the control of the vessel was specifically given to the Master of the ship who is the employee of the United States. The duty of manning the ship was taken away. All that the general agent does under the present contract is to make available the crew, to procure them for the Master who employs them. Therefore the control of the ship here, on the face of the contract, is placed in the United States; and the contract, going on from that assumption, that the control is in the United States, places duties upon the agent, as in Paragraph 14th, and says all those duties are subject to the orders and the regulations of the United States, which is in control.

So this case is entirely different from the Quinn case. Here we do not have control and here we do not have the burden mentioned in the Quinn case of going forward to show that our control has been limited by

subsequent regulations. The burden is upon Mr. Fisch to show that notwithstanding 301
the evident control, the apparent control, which is spoken of in the contract as being on the United States, somehow or other, the agent got into the picture and took the control away from the United States or that was the United States' arrangement.

Mr. Fisch: I think we can clarify the situation, your Honor. I did not realize what the contract now says, Article 14.

The Court: Yes, sir.

Mr. Fisch: "The general agent shall, 302
unless otherwise instructed." Now, we had no proof here that they were otherwise instructed. There is no proof that they were instructed at all, so we must stick to this agreement. But, we go a little further:

"Subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States."—as may be. We do not know whether there was a single regulation here. We know nothing at the present moment, but we have this contract.

The Court: You could find that out, 303
couldn't you, in an examination before trial?

Mr. Fisch: We were not interested, for this reason: We went through so many of these cases, and I have a complete trial in my office of a case similar to this on all fours, with the exception, as I said, instead of the wood being bad, the metal chain was bad.

From the beginning to end, all we proved was the contract, and three Judges at three

different trials thought that was sufficient
304 under the law. If they had regulations, it was for them to prove those regulations. Now, I will submit that to your Honor.

There is one more phase, which is the bone of contention here, and we are going to stick to that until the United States Supreme Court decides that. I do not mind making the statement that the United States Government is trying to help out these operators who originally owned this ship. As soon as the Brady decision came down,
305 it became evident they might try to throw these litigants into Admiralty. If you read all the articles, your will find that they did not succeed.

I will tell you why. There was a difference between tweedle-dee and teedle-dum. In the first contract, the agent had a duty of employing the crew. In the second contract, he only supplied the crew, and the crew became employees of the United States Government. Now, mark you and see this distinction. But the entire contract as to Article 14 is similar to the original Article
306 14, which had to do with repairs. And as Judge Libell said when he dismissed in the Export Line a complaint, where the failure or the negligence was asserted to be the negligence of the crew, he said there is no question here about appliances being defective, realizing that in both contracts he was passing on a new contract, realizing that the appliances—that the duty of making repairs, was upon the agent.

Now, we go a step further. You will find

in some of these articles, some of these articles from 1 to 20, that they talk about 307
the agent being the custodian of these ships, the agent being the manager and managing and operating the lines or the business of this defendant. You cannot in one breath say one thing and in another breath something else; and they say, when this contract is terminated, the agent is supposed to turn over all the ships in his possession and in control, that he has, to the United States of America, which to me seems that there has been no change in the first contract 308
from the second contract.

I don't think they succeeded, even on the proposition of negligence of manpower. Now, I am not talking about negligence of appliances. Negligence of appliances—every case that I have tried has gone to the jury, and every case in the ten cases I have cited to your Honor, submitted to Judge Walter, Judge Levy, Judge Schreiber, Judge Goddard, Judge Clancy, Judge Kennedy—I ask your Honor to reserve decision until I can bring this record to you. You can read it at your leisure. 309

The Court: The only thing that troubles me, Mr. Fisch, is whether or not there is a failure of proof. Maybe nobody ever raised that question before. Did anybody ever raise it before?

Mr. Fisch: Not just that. It was raised, that I have not proven a cause of action on the contract, or any other cause of action.

The Court: I do not think the motion to dismiss the complaint on the merits is good.

but it is questionable in my mind as to
310 whether the motion to dismiss on the particular point I point out, without prejudice, by reason of failure of the proof, is good.

Mr. Fisch: Will your Honor reserve decision until I can give you this complete record and also maybe a case or two, that we have a right, if they say this contract has been changed, it's for them to prove the change? At the present moment, we rest on this contract.

The Court: All right. I will reserve de-
311 cision on the motion. You can produce anything you want at two o'clock.

Mr. Fisch: I will bring the record at two o'clock, your Honor.

The Court: All right.

(Luncheon recess declared.)

AFTERNOON SESSION

The Court: Ladies and gentlemen of the jury, we are going to adjourn this case until ten o'clock tomorrow morning. Do not
312 discuss the case among yourselves nor permit anybody to discuss it with you and do not visit the scene of the accident. Ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until Thursday, June 7, 1945, at 10 A.M.)

Thursday, June 7, 1945.

313

TRIAL RESUMED.

(Same appearances.)

Mr. Fisch: Your Honor, while waiting for some of the jurors, perhaps we can get through with some of the things we started last night, in the absence of the jury.

(Jury retired from the courtroom.) 314

Mr. Fisch: May it please the Court, in conjunction with what we discussed last night, I just want to call your Honor's attention that rules and regulations or orders which are issued in addition to the agreement which is before your Honor and in evidence can only have three effects: They will either add or subtract from the contract or they will repeat the terms in the contract, which would be meaningless, because if all they do is repeat and reiterate, it has no place. 315

Now, if they add or subtract, it is a modification of the contract, and we ask your Honor or we say to your Honor that in 2 Clarke of the New York law on contracts, page 1174, stated:

"The burden of establishing by satisfactory evidence the alleged modification of an existing contract is on the party alleging it."

316 Then we go to 17 Corpus Juris Secundum, Section 588, page 1229:

"The party asserting the modification of a contract has the burden of proof."

Now, in spite of the fact that we claim we know of no modifications of this contract, we know of no orders, nevertheless, so that there be no doubt on the subject at all and in conformity with your Honor's statement that perhaps an examination before trial should have been had, we ask your Honor to permit the plaintiff to re-

317 open his case only for one purpose of attempting to prove, if he can—it may be possible—to introduce in evidence all rules and regulations, if they exist, pertaining to this contract.

The Court: Motion granted to that extent.

(Jury returned to the courtroom.)

Mr. Fisch: Mr. Winsch, please.

(Plaintiff's case now reopened.)

318 ---

HAROLD WINSCH, residing at 7040 Colonial Road, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Winsch, what is your business, please? A. Steamship agent and operators and brokers.

Q. And are you employed at the present time and by whom? A. I am employed by Thor Eckert & Company. 319

Q. What is your position in that firm? A. Manager.

Q. Did you receive a subpoena yesterday that asked you to bring down all the rules and regulations and orders issued by the War Shipping Administration in relation to the contract which is marked GAA 44.42? A. I received a subpoena. I am not sure of the number of that contract, but I presume we agreed on the number of it.

320

Mr. Parmer: Have you got the subpoena with you?

Mr. Fisch: We will show you the contract.

Mr. Parmer: Let's see if you have the subpoena. That will speak for itself.

Mr. Fisch: I think we passed that.

Mr. Parmer: What is the question to the witness now?

Mr. Fisch: I want to show him the contract.

By Mr. Fisch: 321

Q. On the first part, it tells you, on top, the date, and so forth. A. The subpoena did include this form of contract.

Q. Yes? A. Yes.

Q. Had you received any rules and regulations, written papers, from the War Shipping Administration, concerning the contract that Thor Eckert had in relation to the operation of S. S. Everagra? A. Yes, sir.

Q. Did you bring them down with you? A. Yes,
322 sir.

Q. Are these the things you brought down? A. Those are the ones I have been able to get together up until this morning. We had insufficient time to gather all of them.

Q. That is all right. That will be fine. And also this? A. Yes, sir.

Mr. Fisch: We offer them in evidence.

Mr. Parmer: No objection.

Mr. Fisch: Your Honor, may we consider these things, just all these packages
323 of data which the witness has stated he received in relation to the operation of that vessel? All I can do is offer it in evidence. It is up to the Reporter or perhaps ourselves to mark it in the best possible manner so that we know—

The Court: You advise the Court what you are offering in evidence.

Mr. Fisch: We offer all the rules and all the regulations that Mr. Parmer says we are obliged to offer.

The Court: I haven't heard Mr. Parmer say anything.

324 Mr. Fisch: In his motion to dismiss, he stated that.

The Court: Mark them.

(Rules and regulations received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Fisch: That is all.

The Court: You may step down.

(Witness excused.)

HARRIS LEVY, residing at 2137 Wallace Avenue, Bronx, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows: 325

Direct Examination by Mr. Fisch:

Q. Mr. Levy, you are employed in my office? A. I am.

Q. Did you give that subpoena duces tecum to someone in that office in charge of the records to read? A. I did.

Q. Did you give that subpoena tecum to someone in that office in charge of the records to read? A. I did. 326

Q. Who was it? A. Mr. Blasie.

Q. Did he accept the subpoena? A. He did not.

Q. Did he give you a reason why he refused to accept the subpoena? A. He did.

Q. What was the reason? A. He said that they were not subject to subpoena unless directed by the Washington office of that department.

Q. Did he, however, after reading the subpoena duces tecum, hand you some book? A. He did.

Q. Did he give you any information in relation to that book? A. He did. 327

Mr. Fisch: We offer from pages 326 to 336 in evidence.

Mr. Parmer: Your Honor, I had a conversation with Mr. Fisch before this was offered and I told him I would have no objection on the ground that it had not been proved properly, to the admission of the whole book for what it purports to be; and I have no objection to the offer of the whole book for what it purports to be now.

However, I do object to your reading from
328 certain selected portions of it.

Mr. Fisch: Then I will offer the whole book.

Mr. Parmer: In other words, it is a compilation of standard contract forms.

The Court: The objection is withdrawn then?

Mr. Parmer: That is.

(Book received in evidence and marked Plaintiff's Exhibit 7.)

329 Mr. Fisch: Your Honor, I am going to call a very important witness, Mr. Raymond Parmer.

RAYMOND PARMER, residing at 261 Highbrook Avenue, Pelham, N. Y., called as a witness in behalf of the plaintiff, being first duly sworn testified as follows:

The Court: On this Exhibit 7, what pages do you wish to call my attention to, Mr
330 Fisch?

Mr. Fisch: 326.

Direct Examination by Mr. Fisch:

Q. Mr. Parmer, you are the attorney who is trying this case— A. Yes.

Q. —for the defendants? A. Yes.

Q. And have you in the past week visited the office of the War Shipping Administration at 45 Broadway? A. Yes.

Q. And the purpose of your visit, was it not, to find if there were any rules and regulations pertaining to this War Shipping Administration agency contract? 331

The Court: Don't answer it. On my own motion, I will sustain the objection.

Mr. Fisch: We respectfully except.

The Court: Certainly.

By Mr. Fisch:

Q. Did you procure in that office any data in relation to rules and regulations that pertain to this agency agreement? 332

The Court: On my own motion, I will sustain the objection.

Mr. Fisch: We respectfully except. That is all.

The Court: You may step down.

(Witness excused.)

Mr. Fisch: That is the plaintiff's case, your Honor.

The Court: All right. Are you prepared to point out to me, Mr. Fisch, what you say is pertinent to your case in these hundreds or perhaps thousands of pages that you have offered in evidence under Plaintiff's Exhibit 6? 333

Mr. Fisch: Yes, I may, your Honor.

The Court: Very good.

Mr. Fisch: Here it is.

The Court: All right. I will reserve decision on the whole motion. Take an exception to my reservation of the decision.

Mr. Parmer: Yes.

334 The Court: I call your attention to this, Mr. Parmer.

Mr. Parmer: Yes. I am well aware of that, your Honor. Your Honor calls my attention to a maintenance and repair, regulation No. 1.

The Court: Which Mr. Fisch says is part of Exhibit 6. That is correct, Mr. Fisch?

Mr. Fisch: Yes.

Mr. Parmer: This is part of Exhibit 6, and is the only thing on which he relies, I take it.

335 Mr. Fisch: Yes.

The Court: The only portion of the exhibit on which you rely?

Mr. Fisch: That is right.

The Court: All right.

Mr. Parmer: I call your attention, your Honor, to the fact that obviously there are many other regulations, and I assert that there are other regulations which affect this vitally, many regulations which affect this vitally; and that no one can tell from just putting in evidence one of the manifold regulations of the W. S. A., just what the du-

336 ties of the agent were at the time in question.

With respect to this particular regulation, I have this to say: On the first page of it, it says that the maintenance and repair of all vessels owned by or under bare boat charter and operated for account of the United States, represented by the War Shipping Administration, are under the direction of the Executive Manager, Main-

tenance and Repair Division, who will exercise full authority and control over all ship repairs and maintenance, in which the War Shipping Administration may be concerned, and so forth. 337

That Paragraph 2, entitled "Repairs to be Ordered by General Agent," says this: In instances where vessels owned by or under bare boat charter to the United States and assigned to general agents under service agreements with the War Shipping Administration, require that repairs . . . involving the expenditures of not more that $10,000 in respect to any one voyage, the general agents shall arrange for and order the performance of such repairs without prior written approval of the local manager, maintenance and repair division. 338

The Court: I read that.

Mr. Parmer: Your Honor, that refers to a situation where it is known that a vessel requires repairs. Where it does require repairs, the general agent puts forward the contract. As a matter of fact, I have ascertained that in this voyage the repairs required were over $10,000, and the thing was handled by the W. S. A. I am just telling you. 339

The Court: That is a matter of proof, isn't it?

Mr. Parmer: It is a matter of proof, and I can prove it. It depends upon whose burden it might be; but it is so. I found that out. And that the general agent's duties, which follow in enumeration thereafter, are all subject to the foregoing paragraph. That

is where it is his position to contract for
340 the repairs. Then he has these duties—

Mr. Fisch: Your Honor thinks I ought to reply to that? I think I can.

The Court: No.

You had better mark that paper as Plaintiff's xhibit 8, and on the statement of counsel for the plaintiff, it is part of Exhibit 6, and the only portion of Exhibit 6 on which he relies.

(Paper received in evidence and marked
341 Plaintiff's Exhibit 8.)

HAROLD WINSCH, recalled as a witness in behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Winsch, on January 27, 1944, the day of this accident, who, if you know, was servicing the vessel Everagra as agent, either general agent or berth agent? A. Well, as general agent, we, Thor
342 Eckert & Company, acted in behalf of the War Shipping Administration, and as the berth agent, the War Shipping Administration assigned the vessel to Moore-McCormack, Incorporated, 5 Broadway, New York.

Q. Did your company have anything to do with the stevedoring of the vessel at this time? A. No, sir.

Q. Who handled that matter? A. Moore-McCormack as berth agent instructed and authorized to handle such matters.

Q. Are they agents of the War Shipping Administration too? A. Yes, sir. 343

Q. Was the vessel on January 27, 1944, at one of the piers owned or controlled by you? A. No, sir.

Q. Do you know what pier she was at? A. The vessel was at Pier 34 North River.

Q. Do you know who has that pier? A. Well, the vessel—the pier, as I recall it, is controlled by the Atlantic & Gulf and West Indies Steamship Company—

Q. Yes? A. —of New York.

Q. Do you know what relation Moore-McCormack had to it at that time? A. Well, as I understand it, Moore-McCormack made an arrangement with Atlantic. 344

Mr. Fisch: Just a moment, please. We must object.

Mr. Parmer: All right.

The Court: Sustained.

By Mr. Parmer:

Q. You have nothing to do with making those arrangements yourself? A. No, sir.

Mr. Parmer. That is all, Mr. Winsch. 345

Mr. Fisch: That is all.

The Court: You may step down, sir.

(Witness excused.)

Mr. Parmer: Captain Bols.

SERGEJS BOLS, resumed the stand, having been
346 previously duly sworn, testified further as follows:

Direct Examination (Continued):

By Mr. Parmer:

Q. Captain Bols, I think the last question I asked you when you were on the stand yesterday was with respect to the inspection you made thereafter. Do you recall making an inspection after the accident? A. Yes.

Q. And what did you find? A. Well, I found all
347 ship's gear and shackles, wires, everything in good order. Nothing was broken except the boom.

By the Court:

Q. Except what, Captain? A. Except the boom.
Q. The boom? Keep your voice up.

By Mr. Parmer:

Q. Where did you observe the boom? A. The boom was laying between winch and that bulkhead there.

348 Q. This after bulkhead? A. Yes, between them.

Q. Do these pictures, Exhibits C and B, show the position of the boom after the accident? A. Yes. Yes.

Q. And where were the wires and the various cables? A. They were laying all around the deck there, and later on guys and "preventers" were taken on the side. There is a place to walk.

Q. You put them to one side there so there would be a place to walk? A. Yes.

Q. How long did the boom remain in the position that you have described? A. It remained—the boom remained next day, the 27th, and pictures were taken, as I remember, on 28th; and then, after that, we took this boom off. I don't remember exactly dates, but it was at least two days. 349

Q. Was the condition of the broken appliances disturbed in any way from the time of the accident up until the time that the pictures were taken? A. Sure, it was [redacted] across thte passage there.

Q. Do you understand what I mean by "disturbed"? 350

Mr. Fisch: Changed.

Q. Changed? A. No. No. There was nothing changed.

Q. Kept in the same condition? A. In the same condition all the time.

Q. Do you remember Mr. Augenti coming on the vessel? A. Yes.

Q. When did he come on? A. He came in at least three-quarter hour or hour after the accident the first time.

Q. Did you say three-quarter hour to an hour after the accident? A. After the accident, yes. 351

Q. Now, Captain Bols, I want you to look at this: These two pieces of wood. Will you tell us whether that is part of the broken boom? A. Yes, that is part of the broken boom, because after pictures were taken, I ordered my carpenter to saw broken part of and deliver that to my office.

Q. You recognize this as the part that was sawn off? A. Yes.

Q. This sliver with the writing on it, was that sawn off by you or was that already broken off at the time? A. It was broken off.

Q. It was broken off? A. Yes.

352

Mr. Parmer: I offer these two in evidence.

Mr. Fisch: Ray, will you give me just a moment, please?

Mr. Fisch: Mr. Caldarola, will you come over here?

(Discussion off the record.)

Mr. Fisch: All right, we consent.

The Court: All right, it may be marked; no objection.

353

(Large piece of wood received in evidence and marked Defendant's Exhibit K-1, and small piece of wood received in evidence and marked Defendant's Exhibit K-2.)

By Mr. Palmer:

Q. Captain Bols, I show you this photograph, No. B, and call your attention to the end of the boom shown in the photograph. Does that show the place where this Exhibit K-2 had come off? A.

354 Yes, that is the place.

Q. You can see it there? A. Yes, but the end of the boom, it was bent, this angle here.

Q. Have you got— A. That is why this end is in such shape.

Q. Wait a minute. We will mark something here. You mentioned a certain angle. Right? Now, are you pointing to the angle now? A. That is the angle.

Q. We have an arrow pointing to this, with the

word "angle" written alongside it. What do you say happened to that angle? A. It was bent by the force. When the boom came this way, it bent this angle. 355

Q. I see Is this the place where the sliver, K-2, came off? A. That is the place, yes.

Q. I will have an arrow pointing to that, with the word "silver" on it. You say that when it bent the angle, it caused these marks to be on it? A. That is right.

Q. That is on the end of the broken parts, is that what you mean? A. That is right, yes.

Mr. Parmer: Your Honor, I'd like the jury to inspect the wood. 356

(Defendant's Exhibit B and K-1 and K-2 were shown to the jury.)

Mr. Parmer: The jurors may feel it, if they wish to.

The Court: Yes, of course. Any juror in the second row that would like to do so may step down. There is no obligation on you to do so, but if you wish, you may.

(Jury inspected the exhibits.) 357

By Mr. Parmer:

Q. Now, Captain, I call your attention to this place right there. Notice the angle? A. Yes.

Q. Can you tell us what that represents? A. That is because two iron—from here was gooseneck.

Q. Yes? A. Two pieces of iron goes for about three feet, and they are clamped with these straps here, two places. That iron was here. One iron

was on this side. That is the end of the iron here.

358 Q. I see. A. On both sides.

Q. That is the iron on both sides? A. Yes.

Q. Ended in these angles? A. Yes. Ended in these angles. It was two iron straps around there. You can see that from the pictures too.

Q. And this discoloration here is due to what? A. Due to iron.

Q. Iron? A. Iron rust, rust.

Q. Have you a knife with you? Will you cut out a piece from this place here so we can see the condition of it.

359 Mr. Fisch: I don't think—your Honor, we would object to this exhibit being touched in any way at all.

The Court: Overruled.

Mr. Fisch: We respectfully except.

By Mr. Parmer:

Q. Will you cut out a piece from this place where the iron was so that we can see its condition underneath (referring to Exhibit K-1)? A. It is impossible to cut.

Q. Well, do your best. Work at it, please. A.

360 I can't cut that.

Q. Stand up, Captain. You are sitting down, Captain, and you haven't got your leverage with you. A. Sorry. I can't do it.

Q. Can't do it with a k[illegible]. Have you got a better knife in your pocket? If not, we will send for a saw.

The Court: Send for a saw. I wouldn't bother, if I were you. I'd send for a saw.

Mr. Fisch: You are liable to hurt yourself. Send for a saw. 361

The Court: Let the record show that the Captain and counsel were unable to cut a piece from the portion of K-1, where the Captain identified the angle to be the place where the gooseneck rested. It that right?

Mr. Parmer: Yes, the angle of the strap and the gooseneck rested.

The Court: The strap and the gooseneck.

By Mr. Parmer:

Q. Captain, had you been present at any time previous to the accident when this boom had been inspected or tested? A. Yes. 362

Q. And when was that? A. It was in Boston at the end of December or beginning of January, 1942 or 1943, in January. Lloyds tested all the booms on board ship before giving a certificate to the ship.

Q. Were you present during the— A. Yes. I was present.

Q. Did you see it tested? A. Yes.

Q. And what weight was the boom tested for? A. It's about two and three-quarter tons. 363

Q. Two and three-quarter tons? A. Yes.

By the Court:

Q. Tell the jury how the test was made. A. The test was made by—I mean, using ship's winch and special—special scale where it's shown, and the derrick is, I would say, 45 degrees, and with the ship's winch, you—the scale is near the deck. It shows pound. And one end is fast at the deck

somewhere and the other end with a hook and
364 wire, which goes through the blocks, all blocks and on winch, and then usually ship's officer is standing.

Q. Not "usually." What did you see upon this occasion? A. On this case, this derrick was tested in about 3500 pounds.

By Mr. Parmer:

Q. Did you see it done? A. Yes. Well, it's usual—

Q. Was that method that you just described
365 used? A. Yes, from my experience.

Q. Never mind your experience. We want to know what happpened, what you saw happen. A. Yes; I saw it.

Q. Did you get a certificate at that time? A. Yes.

Q. Have you got it with you? A. I have certificate with me.

Q. I want to know the date, the exact date. Will you get the certificate, because I want to know the exact date when this thing happened. Where is it?

(Discussion off the record.)

366

Q. January 12, 1943? A. Yes, that's it. This certificate was issued.

Q. How did this certificate happen to be issued and this survey to be made? Was it just for booms or other things? A. No, the survey was made for all ship: Machinery, hold, and block pegs, and everything.

Q. How often does that survey on board your ship and other ships take place? A. On all ships, it takes place every four years.

A Juror: How long?
Mr. Parmer: Every four years. 367

Q. And this was the fourth year inspection? A. That's right.

The Court: What date is that?
Mr. Parmer: January 12, 1943.

Q. Just about a year before this accident, right? A. That is right.

Q. And this is the certificate you received from Lloyds at the time? A. That is right. 368

Mr. Parmer: I offer it in evidence.
Mr. Fisch: No objection.

(Certificate received in evidence and marked Defendant's Exhibit L.)

(Defendant's Exhibit L was shown to the jury by Mr. Parmer.)

By Mr. Parmer:

Q. I just want to bring out one fact while the jury are looking at that. Are you acquainted with the weight of the cargo which was being loaded from the ship at the time this accident happened? 369
A. I didn't hear you.

Q. Can you tell us the weight of the bags of cargo which were being unloaded from your ship at the time this accident happened? A. It was nine bags castor seed.

Q. How much did each bag weigh, approximate-

ly? A. I really don't remember exactly weight.
370 It's around 100 pounds.

Q. Around 100 pounds? A. Each bag.

Q. Previous to this accident, what sort of cargo was being taken out from that hatch? A. There was—on tween deck, there was rum.

Q. What? A. Rum.

Q. Is that rum? A. Rum.

Q. Rum in what? A. In barrels, big barrels. Also there was.

Q. When you say "tween deck," you mean from this hatch? A. Yes, that is on top of this hatch.
371 It was around 150 tons of general cargo on tween deck before we start to discharge castor seed.

Q. Was this equipment and this particular boom used for that? A. Same thing is used.

Q. How much did the drafts of those drum barrels weigh? A. I don't remember that, but I remember there was besides that, there was ore.

Q. What? A. Ore.

Q. You mean ore? A. Ore in little bags, 50 pounds; little, small bags, some special kind of ore from Brazil.

Q. Yes? A. But I don't remember how many bags they discharged at once.

372 Q. Who looks after, who knows about the weights of the cargo drafts? Do you have any officers who know that? A. Well, they don't pay attention to that either.

Q. That is up to the stevedore? A. Stevedores. Mates check always that hoists that are taken out are not exceeded what the booms can hold, not exceed more than it is on Lloyd's certificate, mentioned one-half or two, three-ton booms.

Q. Does each boom have a rated capacity? A. Yes, and it's written on the side of the boom, capacity, how much it can lift safely.

Q. Do you know what was stated on the side of this boom? A. One and a half tons. 373

Mr. Fisch: I think I will remove this so that there will be no accident.

(Exhibit K-2 removed from the jury rail.)

Mr. Fisch: Your Honor, I prefer to wait until the jurors are finished with the exhibit.

The Court: All right. 374

By Mr. Parmer:

Q. Captain, I show you this Exhibit D. Can you tell us what happpened to the other portion of the broken boom, that is— A. This portion?

Q. That was attached to the mast, yes. A. Well, this, after this accident, the shipyard came to renew derrick. They took this portion off and took that to the top of the—I don't know what happened.

Q. Keep your voice up.

The Court: Captain, you will have to do better. I know that you talk louder on board ship. I don't know why you can't keep your voice up here. Let me have an answer, please. 375

A. Well, this portion was taken off and taken to shipyard, because they used the same gooseneck for new boom.

Q. You don't know what happened to the wood? A. No, I don't know what happened to the wood.

The Court: All right, Mr. Fisch.

Cross Examination by Mr. Fisch:

376

Q. Captain, if there is any question I ask you which you do not understand, will you tell me that, please? A. All right.

Q. The first question that was asked you by Mr. Parmer was, For whom are you working? You answered, for the United States. A. United States War Shipping Administration.

Q. You remember that answer, don't you? A. That's right.

Q. How do you know you are working for the United States of America?

377

Mr. Parmer: I object to that.

The Court: No, overruled.

A. Because the vessel is owned by War Shipping Administration.

Q. Somebody told you that? A. Well, I read in some regulations.

Q. Regulations? A. Every Master on board War Shipping Board is in employ of the United States Government.

Q. Before you came to court, you had a talk with somebody, did you not, about what you were going

378 to say in court? A. A talk? I saw this model in Mr. Parmer's office, but I didn't talk anything.

Q. No. You don't understand my question, Captain.

By the Court:

Q. He wants to know, did you talk with Mr. Parmer or anybody about the case before you came to court.

The Court: That is the information you seek to elicit, is it not? 379

Mr. Fisch: That is right.

A. Well, Mr. Parmer explained—

The Court: Just yes or no.

A. Yes.

The Court: Yes.

By Mr. Fisch:

380

Q. And was the subject for whom you were working—was that asked you? Did Mr. Parmer ask you that question? A. Yes.

Q. Now, as a matter of fact, you get paid, don't you, for being a captain? A. Yes.

Q. Who pays you? A. War Shipping Administration.

Q. You get that in cash? A. Well, I get that in cash through my agent, who is—through the ship's agent.

Q. What is the agent's name? A. In every place, I have different agent.

Q. I am talking about in New York here. A. 381
Thor Eckert & Company.

Q. You go to Thor Eckert & Company to get your pay, don't you? A. I go to Thor Eckert & Company and I inform them how much money I need. I paid myself. I received money for all crew on board ship from Thor Eckert & Company in this case in New York.

Q. Does Thor Eckert & Company pay you in cash or by check? A. I sign always check.

Q. What is the name on the check? A. What is
382 it, a name? It mentioned always "Master S. S.," cash, advance to Master, S. S. Everagra.

Q. But the check has some name. Somebody signs it. You cannot use the check unless it has got a signature or it has got some printed matter on the check. What is the name on the check? A. Thor Eckert.

Q. That's right. Now, you told us also that after this accident happened—when I say you told us, I mean you told us that yesterday, so I can bring it back to your memory or mind, you said
383 that after the accident happened, you went ashore and you called and you said, "I called my office." You called Thor Eckert & Company, didn't you? A. That's right.

Q. Now, how long have you been captain of that ship? A. Since War Shipping took over, May 28, 1943.

Q. You didn't operate this ship before? A. No.

Q. Do you know the nationality of the vessel?

The Court: The registry? You mean the registry?

Mr. Fisch: Yes.

384 A. I was Chief Mate on the same boat that time, was Latvian boat.

The Court: No, the lawyer wants to know —Latvian?

The Witness: Latvian.

By Mr. Fisch:

Q. Would that be Riga? A. That's right.

Sergejs Bols—for Defendant—Cross.

Q. And for how long had you been Chief Mate on this vessel? A. That was since December 16, 1940. 385

Q. How long altogether was it that you worked on this vessel, whether mate, deckhand, or anything else, or captain? A. Nineteen years.

Q. You had the same boom on that vessel? A. That's right. However, I am on that vessel since 1940, December 1940.

Q. 1940? A. 1940.

Mr. Parmer: The 19 years refers to something else. 386

Q. When you said 19 years, what were you referring to? What do you mean? A. All my service at sea. You asked that.

Q. No, I did not mean that. How many years have you been on this vessel? A. Since December 16th, 1940.

Q. Now, do you know how many tons it is, this vessel? How many tons? A. Six thousand four hundred dead weight, 3,700 to Bruto register.

Q. When was it built? A. It was built in 1911, Glasgow.

387

The Court: Bruto, you mean gross.

Q. It was built you say in 1911? A. That is right.

Q. Would you consider it a new ship or an old ship? A. That is not new ship.

Q. Would you consider it an old ship? A. Certainly.

Q. Very old ship? A. Not very old.

Q. Not very old? Thirty-four old and it is not very old? A. No.

Q. How many trips had this vessel made to New
388 York before January 27, 1944, while you were on it?

By the Court:

Q. From 1940 to 1944, how many times did the ship come to New York? That is what the lawyer wants to know. A. I don't remember that.

By Mr. Fisch:

Q. Would you make a trip once a year, twice a
389 year, three times a year? A. Oh, well, we usually —those trips took around three months, from Brazil to New York, but how many trips we made altogether, I don't remember.

Q. And each time you got into the port, you would report to Thor Eckert & Company, would you not? A. I report to Thor Eckert & Company, absolutely.

Q. How would you report, in writing or by word of mouth? A. Well, I go personally always.

Q. You go personally? A. That's right.

Q. What would you report to Thor Eckert & Company? A. That the ship arrived in port.

390 Q. What else would you tell them? Just that? A. Well, I explained how the weather was and how the trip all went, what the conditions were, and so on.

Q. Did Thor Eckert & Company go on this ship at all, Everagra? A. Very seldom.

Q. When you say, "Very seldom," let us take just a year before this man was hurt. You remember that, don't you? A. I don't get you.

Q. A year, the accident happened January 27,

1944. That is about 16 months ago. A. That is right. 391

Q. Let us take the date of the accident and go back for a year. That would be January, 1943. Now, you think you made about four trips between January, 1943, and January, 1944, is that correct? A. Well, I don't remember where I made those trips, how many trips.

Q. I didn't say where. You think you made about four trips? A. I don't know really.

Q. You don't know whether— A. I don't remember so far away.

Q. You don't know whether you made three trips 392
that year? A. I don't know.

Q. —Whether you made one trip to New York that year? A. I don't remember that.

Q. Or whether you made no trips that year? A. Certainly, ship was sailing all the time, but where it was sailing, I have to look in my books.

Q. I didn't say where. I only asked you how many times during the year between January 1943 and '44 did you touch New York, did you touch the Port of New York. A. I don't remember.

Q. But at all events, every time she did dock into New York, you went and reported to Thor Eckert & Company? A. Every time when she 393
docked? Yes.

Q. Do you know of your own knowledge whether on a single occasion anybody from Thor Eckert & Company went on the ship during that year? A. Yes.

Q. When was that? A. I don't remember. I don't remember the dates.

Q. Do you know the person that went on the ship? A. Usually Mr. Olsen.

Q. Mr. Olsen? A. That's right.

Q. Who is Mr. Olsen? A. He is man employed
394 by Thor Eckert in the office.

Q. What is his position in that company, if you know? A. I don't know that.

Q. What did he do? What did you see him do on the ship? A. Once in a while he brought over mail on board the ship, usually on arrival.

Q. He brought mail? A. Yes, mail.

Q. What else did you see him do? A. Well, I explained him how the voyage was, what I need, how much money I need. I report to him.

Q. You explained to him how the voyage was, which means whether you had a rough journey or
395 a smooth journey? A. Yes.

Q. And how much money you need for your crew? A. That's right.

Q. He would give you the money for your crew? A. No.

Q. He would get money for you? A. No. Next day I go to office. I sign a check and get the money.

Q. Thor Eckert would give you money for yourself and the crew, is that right? A. For everybody.

Q. Everybody? A. For all ship's expenses.

Q. And when you say "the ship's expenses," that
396 includes the food? A. No, not food.

Q. What expenses do you mean then? A. Wages, overtime, bonus, my own expenses.

Q. That is really the wages of the men, isn't that so? A. Usually on board a ship all expenses for food, repairs, are paid by the office, by the agent.

Q. How do you know the repairs on this ship were paid for by the agent Thor Eckert & Company? How do you know that? A. Well, since the war, when I am sailing for War Shipping Ad-

ministration, I don't know anything, by whom—who pays them, because I don't sign any bills, anything. I just hand my requisition. 397

Q. Captain, you notice that the end which I show you of this boom is the part that was sawed off. Is that correct? A. That is right.

Q. You notice there are no pieces of wood missing; is that correct? A. Where, missing?

Q. It's smooth right here, is it not? A. That's right.

The Court: Except for that crack.

Q. Yes, except for the crack. A. That's no piece of wood. It's not missing there. 398

Q. Nothing is missing here? A. No.

Q. And you will notice, as I turn this around, that there are holes all over, pieces of wood missing, don't you? You notice that? A. Well, that broken part. The other end. I told you before that it was smashed against the angle there.

Q. Did you bring—did you have the other piece that was broken off right here? A. No.

Q. It was there on the ship, wasn't it? A. Well, certainly it was, other pieces. It was connected here.

Q. But you didn't bring the piece? 399

Mr. Parmer: Referring to exhibit, Defendant's Exhibit C.

Q. You did not bring the piece that belonged here, the other part of the broken boom? A. No, I did not. No.

Q. Now, were you there when this boom was sawed off? You used a saw for this, didn't you? A. That's right.

Q. You were there, weren't you? A. I was there.

400 Q. And you were there when the other piece that broke off was lying on the deck? A. That was not lying on deck. That was here.

Mr. Parmer: Pointing to Defendant's Exhibit C.

A. (continuing) That other broken piece.

Mr. Parmer: And pointing to the place on the mast where the thing is hanging.

401 Q. You could have taken a saw; as you sawed the piece off, you could have sawed the other piece off? A. No, I couldn't, because goosenecks, those iron —I mean on both ends, these iron parts. I can't saw the iron off.

Q. No. I did not ask you— A. Well, it's impossible to saw that.

Q. How long are the irons? A. You can see that.

Q. No, I am asking you. A. This is iron.

Q. How long? A. Well, it's about two or three feet. I don't remember.

Q. Two or three feet, but you could saw beyond
402 the iron, couldn't you? After the iron, when passed the iron, you could take that piece off? A. No, it was broken right by the iron. You can see here. This is—it was broken inside the iron.

Q. This part is wood, is it not? A. That is wood.

Mr. Fisch: Referring to Defendant's Exhibit D. Your Honor, may I impose upon the witness to step down for a minute?

The Court: Certainly.

403

(The witness left the witness chair and stood before the jury.)

By Mr. Fisch:

Q. You just stay this way and face the jury so that you can see what I am doing. Here is this other part that I am pointing to that was broken. That is not in court. Is that correct? A. That is right.

Q. This is iron, is that right? A. Yes, sir.

404

Q. This is wood? A. That's right.

Q. This is iron? A. Yes.

Q. You could have cut the wood right here, couldn't you? A. Excuse me. This is iron too.

Mr. Parmer: May those be marked?

Mr. Fisch: It is marked.

Mr. Parmer: The exhibit is marked. The part that the witness is pointing to, may those be marked so that we know what he is talking about?

Mr. Fisch: I will have him mark it. Just let me finish my question.

405

By Mr. Fisch:

Q. Captain, the iron that you point to at the sides, we see the irons right here, do we not? A. Yes, that is the end, but you can see—

Q. On both ends? A. That's the end. It goes right here.

Q. Yes? A. That is the end on one side and the end on the other side.

Q. And how many feet in length are those irons?
406 A. About three feet.

Q. Three feet? And they are attached to the wood by screws, are they? A. No, they are attached by these straps here.

Q. And these straps can be taken off, can they not? A. Well, it's a bolt holding these straps.

Q. I say the straps can be taken off? A. Certainly, can be.

Mr. Fisch: Mark the iron with the letter "I," or you mark it, Ray. That will be better.
407

(Exhibits marked.)

Mr. Fisch: Where the irons are, it is marked with the letter "I."

Go back, Captain.

(Captain Bols resumed the witness chair.)
chair.)

Mr. Parmer: You mean, Mr. Fisch, where the ends of the iron are marked with the letter "I."
408

Mr. Fisch: That is right.

Mr. Parmer: Because you realize the witness testified that these irons extend the entire length of this piece.

Mr. Fisch: He said about three feet.

By Mr. Fisch:

Q. Now, Captain, you notice that there is a groove here? A. Yes.

Q. And it is brown in color? A. Yes.

Q. That is where the pin— A. That is a bolt goes through. 409

Q. Bolt or pin? A. Yes, iron bolt.

The Court: Indicating the rough end of Exhibit K-1.

Q. And this was right through the boom, was it not? A. Well, it's right from one strap to another strap, holding them together.

Q. And looking at that strap, you could tell, could you not, that there was a pin through this wood? A. Yes. 410

Q. So anybody who made an inspection of this boom and saw where the irons were at the edge, they could see that there was a pin, still see the pin or bolt, as you say, right through the center of the boom, is that correct? A. That is right.

Q. Do you know anything about ship building, Captain? A. Well, I am not an engineer, I am a captain.

Q. I know. You only take care of the vessel for navigation, is that correct? A. For everything.

Q. You don't know whether this boom or—I will withdraw that. 411

Q. You don't know whether it was necessary to put that pin through the middle of this boom, do you? A. Absolutely necessary.

Q. You know that? A. Yes.

Q. Have you seen booms without pins, similar booms? A. Well, I never have such—never saw such accident. I never meet that.

Q. That is not the question that I asked you. You said a moment ago it is necessary to have pin—

By the Court:

412 Q. The lawyer wants to know, have you seen other booms with a gooseneck around them and a pin through them? A. Yes. Every wooden boom, every boom, have these same things.

By Mr. Fisch:

Q. You have seen that? A. Yes.

Q. Now, when this boom was tested, you did not personally make the test, did you? A. Well, I was present.

413 Q. I know, but you didn't make the test, did you? A. I was present together with Lloyd's surveyor, and we—I was not at the winch, but I was looking on a sketch.

Q. You were looking? A. Yes.

Q. You were not doing the actual testing, were you? A. Well, that is what it is, actual testing.

Q. Do you know of your own knowledge that when you put a pin through a boom in this fashion, that the strength of that boom is cut in half?

Mr. Parmer: Your Honor, I object to this. The claim here is not that there was any
414 original wrong construction of a boom. It is that the boom was rotten, and so forth.

The Court: Overruled.

By the Court:

Q. Do you know that as a fact? Yes or no? A. No.

By Mr. Fisch:

415

Q. Now, Captain, you told us that after the accident you saw this man Caldarola walking with two other men. Was he walking alone or did they hold him up? A. No. I told on each side he has man, that are holding him up.

Q. And how far did they walk with him? A. To the No. 2 hatch, bunker hatch.

Q. How many feet in your opinion would that be? A. I'd say it's about ten feet or twelve feet. I don't remember.

Q. And then he sat down, is that correct? A. 416
Yes. I asked those men to sit down that man over there, and I inspected him.

Q. And then you came over, you talked to him? A. Yes.

Q. Did he talk to you? A. Well, I don't remember. He was holding his hand to the head. I remember that.

Q. You don't remember whether he said one word to you, do you? A. Well, I don't remember exactly.

Mr. Fisch: That is all.

417

Redirect Examination by Mr. Parmer:

Q. Captain, were you dressed in uniform at the time that you saw Mr. Caldarola? A. No.

Q. Now, Captain, when you are in other ports than New York, from whom do you get money? A. My agent.

Q. Is that Thor Eckert & Company or are other persons— A. Other persons. Never from Thor Eckert & Company.

Q. Those are agents of the War Shipping Ad-
418 ministration as well? A. Yes.

Q. And Thor Eckert & Company merely gives you your money in New York? A. That's right.

Q. Was this boom which broke at the time of the accident on the vessel at the same place on the vessel at the time that the War Shipping Administration took over the vessel? A. Same boom, yes.

Q. Captain, you mentioned that when you came into port, you came with requisitions. What kind of requisitions did you come with? A. Stores, provisions, repairs.

419 Q. Who prepares those requisitions? A. Chief Engineer prepares engine repairs; Chief Officer, deck repairs; and I also prepare requisition for stores; and Chief Steward prepares a requisition for provisions for next voyage.

Q. And what do you do with those requisitions? A. I usually take them over to agents and give them to the agents.

Q. And on those requisitions do you state everything you need in connection with supplies, equipment, and repairs? A. Yes.

Mr. Parmer: Your Honor, we have a
420 saw.

The Court: All right.

Q. Captain, would you be good enough to saw at the place where you tried to cut with a knife? A. This place? Which way you want it?

Q. I want you to saw the length of this angle here. I will tell you what you do, Captain. Take out a piece just the size, cut right along here and cut right along here, and lift out the piece, if you can.

(The witness saws on Exhibit K-1.)

421

Q. Captain, I am going to recommend you come around here and saw this way so then you will get your saw in that. A. You need a chisel and a hammer.

Q. All right, if you want to go through, go right on, because we can put it in afterwards.

(Sawing of the exhibit continued by the witness.)

Q. Now, can you do the other side?

422

(Witness continued sawing.)

Q. You need a chisel and a hammer, do you? A. Yes.

Mr. Fisch: I will bring you a screwdriver after two o'clock, and a hammer too.

Mr. Parmer: The jury might wish to smell it freshly cut.

(Exhibit handed to jury.)

By Mr. Parmer:

423

Q. Captain, during the course of the voyages which your ship makes, is your crew engaged in doing various work on the ship in the nature of upkeep of the vessel? A. I don't understand it.

Q. I say, during the voyages which your crew makes from New York outward and back, and so forth— A. Yes?

Q. —does your crew have to do any work in the

nature of maintenance and upkeep of the vessel?
424 A. Certainly.

Q. What kind of work does the crew do? A. Engine department crew, they do the work in the engine room; and on deck, the deckhands, they usually paint and scale, and do every kind of work, splice—

Q. Is the painting of booms part of the crew's work? A. That's right.

Q. Before this ship went into the war service with the War Shipping Administration, what was the covering on the outside of these booms at that
425 time? A. On these booms, never were painted. Every year they were scraped and varnished. Varnished.

Q. That is varnished, you say? A. Varnished, like on the sailing ships.

Q. And then when she went into war service— A. Paint everything gray.

Q. I call your attention to this Exhibit K-2, and ask you what this discoloration is here that I am—. A. This is varnish.

Q. Varnish? A. Yes.

Q. Varnish leaking in from the outside, is that the idea? A. Well, it's a little holes or anything
426 in wood, varnish would go in and prevent from water.

Q. What is this discoloration here? A. This is rust from that pin—not from pin but from the iron which is—this is just how you—from gooseneck, those two strips that go over here; and that is at the end of that. It's little rust from that iron.

Q. That is from that iron strip that goes down the length of the gooseneck? A. Yes.

(Exhibit K-2 shown to the jury.)

Q. Tell me, Captain, can you tell us whether this little piece in here is iron or wood? A. No, that is rust, iron. 427

Q. Iron rust? A. Yes. That is rust here. That is all rust.

Q. Rust? A. Yes.

Q. Let's break it off and see. Rust mixed in with wood? A. No. That is rust, goes so far until this plate, and this is wood.

Q. Rust on top of wood? I see.

Mr. Parmer: That is all.

Mr. Fisch: That is all. 428

The Court: You may step down, Captain.

(Witness excused.)

The Court: Call your next witness.

Mr. Parmer: Mr. Peterson, please.

HARRY A. PETERSON, residing at 9426-55th Avenue, Elmhurst, Long Island, N. Y., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer: 429

Q. Mr. Peterson, what is your business? A. I am an assistant local manager, maintenance and repair, War Shipping Administration.

Q. You will have to keep your voice up.

By the Court:

Q. Assistant local manager, again? A. Assistant local manager, maintenance and repair division, War Shipping Administration.

By Mr. Parmer:

430 Q. And where is your office? A. 45 Broadway, New York City.

Q. What do you do in connection with that business? A. Well, ships are operated under charters and boats are requisitioned from the private owners by the Government. We survey the boats and we record the actual condition so far as eyes can see the ship, and in addition to that, I have charge of damage repairs and maintenance and repairs throughout the vessel.

431 Q. Throughout all War Shipping Administration vessels? A. That is, what touches this Port of New York.

Q. Have you brought with you the contracts for the repair of the Everagra and the data with respect to the repairs on the Everagra as of January, 1944? A. Yes, I have.

Q. Will you produce them? A. It's by Todd Shipyard Corporation.

Q. Now, referring to these records, will you tell us when the repairs were begun on the vessel in January of 1944? A. This was on Contract WSA-4792, Supplement 346. That is a Navy defense

432 item started January 26, 1944, completed February 27, 1944.

Q. Now, what about the repairs which were in addition to the Navy defense item? A. Well, the above is that included in that contract.

Q. Yes. A. It's all the same broken down into two parts.

Q. I want to know when the repairs, the general repairs on the ship, were begun. As of what date? A. January 26, 1944.

Q. Are the specifications dated as of that date? A. There is one set here dated January 29, 1944, another February 5, 1944, February 9, 1944. 433

Mr. Fisch: Just a minute. I was wondering, your Honor, whether repairs subsequent to this date—

Mr. Parmer: I am not trying to prove repairs subsequent to the date. I am trying to prove them before the date, that is, I am trying to prove that they were begun on January 26th. That is what I am trying to prove. 434

A. (continuing) February 21, 1944.

Q. Let me call your attention to something. I call your attention to this invoice dated February 10, 1944. When does it say that repairs were started? A. Date started, January 26, 1944, to February 10, 1944, inclusive.

Q. That is, you mean the repairs which were the subject of the contract at that time were going on from January 26, 1944 until this date in February, 1944? Is that right? A. That is right. That is substantiated by the completion certificate signed by the chief officer, chief engineer, and a representative of the W. S. A. agent, and our marine surveyor. 435

Q. Now, when you say "our marine surveyor," you mean the War Shipping Administration? A. W. S. A., yes.

Q. How much did those repairs amount to in excess of defense repairs? A. They are broken down into groups.

Q. Yes? A. We have the old system of grouping, and that time was from 100, 101, up to 600.

That is for segregation of costs so we know where
436 to charge them to.

Q. We want to know how much the bill amounted to. A. The total bill amounted to, including defense items on this contract, $30,354.26.

Q. Now, exclude the defense item, and what did the repairs amount to? A. The repairs under Group 100, Items 1 to 29 inclusive, $29,942.70.

Q. Do you mean by that that those items were the repairs outside of the defense items? Right, sir.

Q. $29,000? A. Yes.

Q. Are you acquainted with the rules or the rules as they were at that time of the War Shipping
437 Administration with respect to the letting of contracts— A. Yes.

Q. —under 10,000 and over 10,000? A. Yes, sir.

Q. In which class did this come? Was this the War Shipping Administration's contract or the general agent's contract? A. W. S. A. It's over 10,000.

Q. It was your responsibility entirely, is that correct? A. That is, to inspect the work and award the contract.

By the Court:

438

Q. Who paid for it? A. W. S. A.

Q. War Shipping Administration? A. Yes, sir.

By Mr. Parmer:

Q. Now, what is the ordinary practice with respect to ascertaining of the repairs that have to be done to a War Shipping Administration vessel when it comes in from a voyage?

Harry A. Peterson—for Defendant—Direct.

Mr. Fisch: We object to that on the ground that the duties of the agent with respect to the repairs have been fully stated in the contract. 439

The Court: Overruled.

Mr. Fisch: We respectfully except.

The Witness. Shall I answer?

By Mr. Parmer:

Q. Yes, you may. A. Well, the agent, the general agent, that is, the agent for the War Shipping Administration, their port representative contacts our office and tells the ship is at a certain dock or it will be there; and we assign a man to the job. It may be the port captain, it may be the superintendent, engineer, or port engineer. However, he is connected with the shore staff. He has a list of work submitted by the chief officer, chief engineer, and the chief steward. They make up that list of repairs. Our job and the agent's job is to go aboard and see the necessity for those repairs. 440

We look at every item, and if the item requires repairs, we have the contractor right there with us—he is making the notes during the war condition, every five minutes—we never want to delay the sailing of the ship. 441

So, the supervisor of the yard, he may have the machinist foreman. He says, "All right, you get started here." As they go along, the machinist foreman is taking his notes.

After they went over the entire ship, they go up into the shipyard, up into the office; and with the supervisor of the yard, he prepares the specifications. They have covered every item submitted by the ship's personnel for repairs. And, then, from

there, as the work is going along, it is supervised
442 by the general agent; that is, he takes care of the job from then on, because with the completion certificate here, it has to be signed by him—the chief officer, sometimes the Captain and chief engineer, stating, "That this is certified to the best of my knowledge and belief, the above statement is in connection with the repairs enumerated in the specifications covered by the contract designated hereon, is true and correct."

Q. Now, you say that the practice is for you to take these requisitions from the ship's crew? A. Yes, sir.

443 Q. Has that always been the practice? A. Always, with the exception of the defense items that we put that in hand ourselves, because we have many communications with the Army and the Coast Guard. We have to do that work, but that is not repairs. That is repairs in this case to defense installations on the ship.

Q. Are you acquainted with the codification of the maintenance and repairs regulations which was issued revised as of December 15, 1944? A. May I look at it, please?

444 Mr. Fisch: What is the date of the revision?

Mr. Parmer: December 15, 1944.

A. I am.

Q. Are you acquainted with that? A. Yes, sir.

Q. Does that state the policy and the practices with respect to the duties of the general agent, as they have been from the beginning? A. Yes, sir.

Mr. Parmer: Your Honor, this is also among that stack.

The Court: Plaintiff's Exhibit 6?

Mr. Parmer: Yes, Plaintiff's Exhibit 6. 445

By Mr. Parmer:

Q. I call your attention to Part 3, former requirements, Section 3-1.

Mr. Fisch: We object to this item on this ground, because on the very paper which Mr. Parmer reads, it says, "Revised as of December 15, 1944, and effective January 15, 1945." It is effective now, had nothing at all to do with 1944, when the accident 446
happened. We contend it is immaterial, even if I offered it in evidence and tried to read some regulation made prior to the time of the accident. It would not be, in my opinion, admissible.

Mr. Parmer: Your Honor, I call attention to the fact that the witness has testified that this is a codification of the rules in existence from the beginning. It is a formal statement of what has grown up.

Mr. Fisch: That is an oral statement contradicting a written instrument which is in writing. The front page, your Honor, 447
the very front, it gives you the whole thing.

The Witness: Can I say something?

Mr. Parmer: You keep quiet.

The Court: Overruled. Mark it.

Mr. Fisch: We respectfully except.

(Received in evidence and marked Defendant's Exhibit M, entitled "War Shipping Administration. Maintenance and Repair Organization. New

York, N. Y., revised as of December
448 15, 1944, effective as of January 15, 1945.")

Mr. Parmer: It is formerly part of Plaintiff's Exhibit 6.

I want to read, your Honor, this clause here. Part 3, formal requirements, Section 3.1.

"Specifications for repairs. General agents shall obtain the vessel's requisitions for repairs from the deck, engine, and steward's departments, and in order to pre-
449 vent delay, shall, when conditions warrant, use these requisitions as preliminary specifications."

By Mr. Parmer:

Q. You state that has always been the practice, is that correct? A. Yes. Yes, sir.

The Court: May I see that exhibit of yours, Mr. Fisch, please?

How does that differ, Mr. Fisch, from Paragraph 3 of your Exhibit 8?

450 Mr. Fisch: Frankly, I haven't even read it. I just saw it. It says, "Revised and effective" as of a certain date, and not to clutter up the record, I just objected to it, because the record would be too big. That is the only reason. I cannot say there is any difference, because I haven't looked at it.

By Mr. Parmer:

451

Q. Now, can you tell us whether in connection with the requisitions for repairs submitted by the crew as of January, 1944, there was any requisition for a new boom or for repairs to an old one? A. I'd have to look through this thing here. I don't know. Is this a stevedore damage? I do not see any in here, any repairs to a boom in there.

Q. Any requests for a new boom? A. Well, I will tell you, I have to elaborate on this thing. If it is a stevedore damage—

Q. I do not mean after this accident happened. 452
I want to know whether there was any requisition for a new boom or repair to any boom on board the ship before this accident happened. A. Not that I can see in this here contract. Of course, you have got other contracts here going back to 1942.

Q. Do the contracts that you have as of January 1944, reflect the requisitions that were made at the time? A. No, sir.

Q. Do you understand what I mean by that? A. You want to know if there is a requisition in here for a new boom,—

Q. I want to know that first. A. —or repairs 453
to a boom?

Q. Yes. A. No, sir.

Q. Are the papers that you have in your hand there made up as a result of preparing requisitions and incorporating them into specifications for repairs? A. Yes, sir.

Q. Now, tell me, Mr. Peterson, if a boom is so rotten as to be powdery, the wood is powdery on the inside, is that a repair job or a renewal job?

Harry A. Peterson—for Defendant—Cross.

Mr. Fisch: We object to that on the
454 ground that this witness is not qualified to testify.

The Court: Overruled.

Mr. Fisch: Exception.

By Mr. Parmer:

Q. Is that a repair job or a renewal job? A. Will you repeat that again, please?

(Last question read by the Court Stenographer.)

455

A. Well, it would go on the records as a repair job, but actually it is a renewal, because we have to define the items for costs. That would come under the maintenance and repair, which would be Group No. 41, but it's actually a renewal—

Q. You have to give— A. —to a defective part. If the boom was powdery, that would be defective. Of course, that specification would read: "Remove and renew and replace as original."

Q. So you need new equipment entirely? A. It's a repair job.

Q. But you need new equipment? A. Absolute-
456 ly. You need a new boom.

Mr. Parmer: That is all.

The Court: Cross-examine.

Cross Examination by Mr. Fisch:

Q. Mr. Peterson, you are with the War Shipping Administration for how long a time? A. I came with them after the last war in 1921, and I remained with them until December 31, 1930. That

was the old Shipping Board. And then there wasn't any more work. So, I came back again in 1937, in July the 22nd, 1937. I have been with them since. 457

Q. What department are you in? A. The Maintenance and Repair.

Q. Now, you told us about usages and customs. You are acquainted with that, aren't you? A. Absolutely, yes.

Q. Are you also acquainted with the contracts that the War Shipping Administration has let, marked W. S. A., or I think it is GAA 44-42? A. That is not a maintenance repair. That is a charter party agreement. That is a service agreement between the WSA and the agent. 458

Q. All right. You distinguish that from something else, is that correct? A. Well, you are asking me about, was it a repair, speaking of WSA contracts. What contract do you mean? Repair contract or a service agreement contract?

Q. I refer to the service agreement contract. Are you acquainted with that? A. Part of it.

Q. Part of it? A. Well, I couldn't digest a dozen pages. I know when I see it, I work with it right along.

Q. Did you ever read the contract? A. Oh, yes. 459

Q. Are you acquainted with the terms of the contract? A. Yes.

Q. You told us about usages. You say when the vessel comes in, the port captain and the shore staff of the agent go on the boat, is that it?

By the Court:

Q. Somebody from the shore staff? A. Absolutely, because—

Q. Isn't that what you said, somebody from the
460 shore staff? A. Well, it's either the superintendent, engineer, or the port engineer, or the marine superintendent, or one of the port captains,—somebody.

By Mr. Fisch:

Q. Of the agent? A. Yes, of the agent.

Q. Of the agent? A. Right.

Q. So that let us assume for the sake of the argument that the vessel comes into the Agwi Lines. Are you acquainted with the Agwi Line?
461 A. Yes.

Q. The port captain of the Agwi Line and one or more men boards the vessel. Is that correct? A. Well, I don't know when they board it. They are on board the vessel when our marine surveyor is there.

Q. I mean with your surveyor.

By the Court:—

Q. Let me ask you a question. When you are talking about a port captain or port engineer, are you talking about the WSA port captain or en-
462 gineer or the general agent? A. The general agents.

By Mr. Fisch:

Q. When you told the Court and the jury before what the custom was about the port captain and the shore staff meeting your engineers, is that what you said? A. That is right.

Q. You meant the port captain and the shore staff of the general agent, didn't you? A. Right.

Harry A. Peterson—for Defendant—Cross.

And they also meet the mate, the captain, and the steward, because they have to go over the repairs. 463
They have to be aboard the ship.

Q. The agent is the one that tells you what repairs are to be made. Isn't that so? A. The agent?

Q. Yes. A. He has a requisition for repair. He has a repair list issued to him or submitted to him by the ship's personnel.

Q. And he arranges for the repairs? A. If it is under $10,000.

Q. Otherwise do you say he has nothing at all to do with repairs if it is over $10,000? A. He 464
supervises the repairs after we have awarded the contract.

Q. He has to take it up with you, if it is over $10,000? A. Right.

Q. But if it is under $10,000, he takes it up with no one? A. He has the repairs made himself. That's right. That is according to the M. & R. regulation, which you have. He is allowed a limitation of $10,000 of work.

Q. Now, you said something about if this boom was so defective or any boom was so defective that it was powdery—you understand what the term "powdery" means, do you not? A. Well, I 465
wouldn't say a wood turns to powder.

Q. But that was the question you answered. A. Well, he asked me—he asked me about, did I understand what powder—something would turn to powder, a defect?

Q. Yes. A. In my experience, wood does not turn to powder.

Q. But that was the question he asked you. You said nothing about your experience when he asked you that question. A. Will you repeat what I said before?

Q. Well, I am not going to repeat it. All I will
466 say to you, all I am asking you now is this: If a thing has got to be replaced, let us assume the boom was a bad boom which had to be replaced, or rather, it had to be renewed; renewed is really replacement, is it not? A. Yes, new part, with a new part.

Q. In your opinion, I mean, having testified now to usages and custom, when you use the word "renewed"— A. That is a new part.

Q. You mean to replace, to replace the old one with a new one? A. No, remove the old and re-
467 place it with a new one.

Q. That's right. A. That's right.

Mr. Fisch: That is all.

Juror No. 8: I'd like to ask this witness a question.

The Court: Ask me, sir.

Juror No. 8: First, I would like to know whose responsibility it would be in the event the boom was defective. Whose responsibility would it be to see that it got into the specifications?

The Witness: It would be the deck de-
468 partment. They would know all about the boom.

Juror No. 8: The War Shipping Board or the agent?

The Court: Read the answer.

(Answer read.)

The Court: Now, your question again? Would it be the deck department?

By Juror No. 8:

469

Q. —Of the War Shipping Administration or the agent's? A. The deck department, that is, the crew aboard the ship, when I speak of the men engaged in the deck department work.

Q. If no such thing were in the specification, would the War Shipping Administration have any responsibility to look around the ship to see if other things needed repairs outside of what were in those specifications? A. As a rule—as a rule, I have distinguished now between war time conditions and—

470

The Court: War time conditions is the question.

Q. As of January, 1944.

The Court: 1944.

A. As they go around the ship on the repairs, both the general agent and the War Shipping Administration man is looking at the same time. There may be an item that needs repair that the crew has overlooked, and they discuss it right there and say, "Well, now, we better do this for you. You overlooked that in submitting your requisition."

471

By the Court:

Q. Now, following out the juror's question, you told them the deck department; that is, the seamen on the boat, on the vessel, is that right? A. Your Honor, when I speak of the deck department, we deal with the officers of the ship.

Q. Officers of the ship? A. Yes, sir.

Q. And the officers of the ship are employees of
472 whom, the War Shipping Administration or the general agent? A. Well, I would assume the WSA.

Mr. Fisch: May I, your Honor, make this statement? I did not interrupt the answers of the witness, but I believe that, under the decisions, it is up to the Court to instruct the jury who had the duty of making the repairs and keeping these things in a safe condition; and that is the only reason I did not object, because it is a ques-
473 tion of law, not of fact.

The Court: All right, you may step down, sir.

(Witness excused.)

The Court: Call your next witness.

Mr. Parmer: Your Honor, may I complete the job on that wood? I have got the tools.

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474 SERGEJS BOLS, resumed the stand and testified further as follows:

Redirect Examination by Mr. Parmer (Continued):

Q. Can you complete the work that you began?

Mr. Fisch: I will put them right over here (referring to chips of wood from Exhibit K-1).

The Court: We will get an envelope and put them in an envelope. I will give you an envelope. Mark the envelope. 475

(Envelope and contents received in evidence and marked Defendant's Exhibit K-3.)

By Mr. Parmer:

Q. Now, Captain, I call your attention to the wood at the place that you cut. Can you see the grain of the wood there still? I mean here and here (pointing). A. Yes. 476

Mr. Parmer: Do you all see that?
The Jurors: Yes.
Mr. Parmer: That is all.

(Witness excused.)

The Court: Call your next witness.
Mr. Parmer: I want to call Mr. Oravs, the carpenter, please, and the interpreter, please.

477

(WALDEMAR VOLKOVIC, residing at 134 Lincoln Place, Brooklyn, N. Y., was duly sworn as an interpreter in the Latvian language.)

JANIS ORAVS, residing at care of Thor Eckert & Co., Inc., 19 Rector Street, New York City, called as a witness in behalf of the defendant, being first duly sworn, testified as follows, through the interpreter:

Mr. Fisch: Your Honor, may we have a
478 preliminary examination of the interpreter, please?

WALDEMAR VOLKOVIC, the interpreter, was examined by plaintiff's counsel, as follows:

Direct Examination by Mr. Fisch:

Q. What is your business, please? A. I am a chief engineer at McNulty Shipyard.

Q. What Shipyard? A. McNulty.

479 Q. What is the business of McNulty? A. Ship repair yard, ship yard.

Q. How long have you worked for McNulty? A. Since 1942, that is three years.

Q. How did you become a witness in this case?

The Court: He is not a witness. He is an interpreter.

Q. An interpreter (excuse me). How did you become an interpreter? A. I was called from Mr. Parmer.

Q. You were called by Mr. Parmer? Do you
480 know Mr. Parmer? A. No. I didn't know him before. I know now.

Q. Didn't know him before? A. No.

Q. Do you know how your name was given to Mr. Parmer? A. It's hard to say. I think the captain.

By the Court:

Q. If you don't know, say "I don't know." A. I don't.

Q. Did you ever see Mr. Parmer before he called you? A. I don't—I didn't. 481

By Mr. Fisch:

Q. Did you ever interpret in court before? A. I did not.

The Court: What was your answer?
The Witness: I did not.

By Mr. Fisch:

Q. Did you know any of the parties in this case before you became an interpreter, the captain or the agent, Thor Eckert & Company? A. I know the captain before. 482

Q. You know the captain? A. Yes.

Q. How long have you known him? A. About seven years.

Mr. Fisch: Your Honor, couldn't we get an interpreter, an official interpreter, here in this court? I thought we had all kinds of interpreters.

The Court: We will adjourn till two o'clock. Do not discuss the case among yourselves nor permit anybody to discuss it with you. Do not visit the scene of the accident. Two o'clock promptly in your seats, please. 483

(The jury retired from the courtroom.)

The Court: They will tell me, Mr. Fisch, they have nobody who speaks Lettish. They will make an effort to get an interpreter, if

both counsel will agree to pay him. They
484 won't get him today.

Mr. Fisch: That will be all right. I will agree to stand my share of it.

Mr. Parmer: There is no objection to that.

The Court: If you wish to press the objection—

Mr. Fisch: It all depends, your Honor, the evidence—at the present moment, we have a man who is a friend of the captain.

The Court: I understand that.

485 Mr. Fisch: I don't know what he is going to testify to. I would say he is not a neutral interpreter, in the broadest sense.

Mr. Parmer: I will say perhaps you are right, but I cannot say that he is not. I know it is hard.

The Court: Do you wish to press your objection? That's all.

Mr. Fisch: Supposing we go ahead with the interpreter and maybe what he says does not amount to anything. I don't know.

The Court: Then, as I understand it, for the present you are withdrawing your ob-
486 jection?

Mr. Fisch: That is right.

The Court: All right. We will adjourn anyhow till two o'clock. The objection to the interpreter is presently withdrawn by Mr. Fisch.

AFTERNOON SESSION

487 Mr. Fisch: May it please the Court, at this time we move to strike out so much of the testimony of the witness Peterson which is in substance or in effect an opinion upon whom the duty to make the repairs rested, as such an opinion is incompetent. The repairs and whose duty it was to make the repairs is stated in the contract and in the regulations is a question for your Honor to decide.

Mr. Parmer: May I be heard on that?

488 The Court: Yes.

Mr. Parmer: The duty on which Mr. Fisch relies in this case is a duty arising from the contract solely. The question was asked of a representative of one of the parties to the contract, he was asked for his definition of the obligation under the contract, to which he or his principal was a part. His answer was entirely relevant to state what the terms of the contract were as understood by the parties.

The Court: I will grant the motion to the extent of striking from the record that 489 portion of the answer which was given in opinion form.

Take an exception, Mr. Parmer.

Mr. Parmer: Exception.

The Court: The answer, I think, was "I assume." I think the witness used the word "assume." That is what I am referring to.

Mr. Parmer: Very good. "I assume that they were employed by the W.S.A."

JANIS ORAVS, resumed the stand, having been
490 previously duly sworn, testified as a witness in behalf of the defendant, through the interpreter, Mr. Volkovic, as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Oravs, what is your business and employment?

The Interpreter: He is a carpenter.
The Court: What is it?

491 A. I am a carpenter.

Q. Are you employed on a ship? A. Yes.

Q. Is that the Steamship Everagra? A. Yes.

Q. Were you employed on the Steamship Everagra at the time of the accident to the longshoreman on January 27, 1944? A. Yes.

Q. Did you see the accident happen? A. Yes.

Q. Now, using this model which is marked Defendant's Exhibit E, can you tell us or point out to us where you were standing? A. Yes.

Q. Will you come down here and point out where you were standing when the accident happened?

492 (Witness left the stand and approached the model.)

A. At the moment of the accident, I was standing right here.

By Mr. Parmer:

Q. I call your attention to the fact that you are pointing to the coaming. Do you mean you were

standing on the coaming or on the deck near the coaming? A. I was standing on the deck. 493

Q. Let us mark that "OR" in pencil for Oravs.

(Model so marked.)

Q. Is that the place now where you were standing? A. Yes.

Q. Now, tell us what you saw happen, first. A. First I was watching the longshoremen discharging the cargo, and I took a look in the hatch how much cargo are left.

Q. Is left? A. Is left.

Q. Was there anybody with you at the time? 494
A. Yes.

Q. Who was that? A. This gentleman.

Q. This gentleman over there?

Mr. Parmer: Will you rise? What is your name?

(The man addressed: Belochioscik.)

By Mr. Parmer:

Q. You looked down and you saw what cargo was in the hatch? What did you see happen next? Go 495
right on and tell us everything you saw up until the time of the accident. A. Then the accident was happened.

Q. Tell us what happened, please, everything you saw. What happened then?

The Court: Might I suggest that you take your witness around on your side, so the jury can see what he is doing?

Mr. Parmer (addressing the interpreter): Will you ask him to begin again?

The Court: Did you see that, ladies and gentlemen of the jury?

A Juror: No.

The Court: The answer is No. Ask him to demonstrate that again.

Mr. Parmer: Will you ask him to demonstrate that again? Now, to be sure, will you translate that in English?

The Witness (through interpreter): I was standing here at the point marked "OR" and watching the longshoremen work. The port side man, who handled this line, kept pulling the load, and the splice of this manila rope got caught in the top block.

Mr. Parmer: Tell him to continue.

(Witness spoke in Lettish.)

Mr. Parmer: Now, can you translate all that into English?

A. When the load was lifted up and and the port side—

The Court: Please do better than that. Talk up, Mr. Interpreter. Go ahead. Start again now.

A. When the load was lifted up and the splice of the rope was caught in the top block, in the same time, the starboard man kept pulling his line, here, and the starboard boom kept coming up, because that splice was caught in the block. When the block was nearly perpendicular, the port side man let

his line go free, and the boom fell; and in the same time, get cracked here, in the place. 499

Q. What happened to the man who was running this drum on the starboard side? What did he do? A. At the moment when the boom cracked, the man who handled this line jumped back in back of this Simpson post.

Q. Sampson. A. And the falling stay hit him on his head.

Q. And what happened to the boom, the broken part, the upper broken part of the boom? A. When the boom broke, it fell in here between the winch and this bulkhead. 500

Q. Mr. Oravs, can you demonstrate by means of this model the twisting force put upon this boom by what you described as having seen happened?

Mr. Parmer: If he needs anybody to hold anything, why—

The Interpreter: I will hold it.

Q. Go ahead, tell us. A. When the port side man pulled the load out and splice of the rope, it caught in here in the block. The starboard man pulled up his starboard boom—

Q. Yes? A. —so hard against the heel block nut of the gooseneck and the boom got twisted, the boom reinforcement is steel, got twisted. Now, in same time— 501

Q. Continue with his answer. I want you to complete his answer. A. That gooseneck pin and the boom reinforcement got twisted, and in same time, the port man on the port boom let his line go, and the boom fell and broke; and also that man who operated the starboard boom had one-third of this rope caught over the leading line, the

leading end, that is, this one that goes here (demonstrating). And he was unable to quickly loosen up his boom, the port side boom, to let go down. One-third was caught.

Q. I want you to put that back in the place where it was when it was caught up against the Sampson post in order so that the jury can see the strain and the direction of the strain that was put upon the top of that boom at that time.

Mr. Parmer: Can he produce the same effect by pulling? He does not have to wind the thing around each time. Tell him when the boom was pulled up, did it go over this way or did it stop here at the Sampson post?

Q. It stopped at the Sampson? A. It stopped at the Sampson Post, this (demonstrating). The boom was pulled up and stopped at the top of the Sampson post.

Q. Now, let us fix this guy so that it will stop there. Now, will you put the strain on this? Does that show the twist? A. Yes.

Q. Now, it was after that that the boom fell down? A. Yes.

Q. Was it after that that it broke? A. Yes, it broke after it fell.

Q. Now, with regard to this turn that you say was overriding the other turns on the niggerhead, I want you to tell us what you saw this winchman doing with regard to that? A. He jumped back.

Q. I want to know what he did before he jumped back with regard to this turn that you saw overriding the other turns? A. When the turn was turned, he couldn't do anything. He tried to run

at the winch and stop the steam stop valve, but the winchman did it, and he jumped back of the Simpson post. 505

Q. You say you saw him try to get the turn off? Is that what you mean? A. No. He didn't say that. He didn't try to do it, because that was impossible to do. H tried to stop the steam stop valves, tried to stop the winch, because there was another, third man, assigned to the job.

Q. What did you see that man do who was at the steam controls of the winch? What did he do? A. He stopped the winch.

Q. When did he stop the winch? A. He stopped the winch when the boom was broken and down on the deck. 506

Q. Well, did anybody try to stop the winch before the accident happened? A. No.

Q. Did you see any gangway men around there besides these three winchmen? A. There was a sling man also.

Q. A sling man? What does a sling man do? A. He watches the sling or the load coming out from the cargo hold, follows it up to the side of the ship, and gives orders to lower down.

Q. Did you see that sling man do anything just before the accident? A. He didn't do anything. 507

Q. Did he give any warning to anybody? A. He didn't hear the sling man to give any warning to the workmen but he run himself forward in the ship.

Q. You mean he ran? A. —Forward in the ship.

Q. In the way you are pointing now? A. That is in the direction of this forward bulkhead.

Q. What did you do after the accident happened? A. I went over to look what happened, which that man who operated this fall—

Q. What did you do when you got there? A. I
508 tried to see what happened to him, and then I went to call the captain.

Q. What did you observe about that man at the time that you got there? A. In my opinion he was a little dizzy.

Q. Was he lying down or standing up? A. He was sitting on the bunker hatch.

Q. Which bunker hatch? I show you Defendant's Exhibit C. A. He was sitting there at the bunker hatch.

Q. You are pointing to the forward inboard corner. A. Yes. He was sitting at the forward end
509 of the bunker hatch.

Q. Was there anybody with him at that time? A. Three came and brought him away.

Q. I want to know whether at the time that you got there there was anybody with him then. A. There wasn't anybody around him.

Q. Were you the first one to get there with him? A. Yes.

Q. Did you see any blood on his head? A. I cannot remember seeing any blood, but—but he was holding his hand to his head.

Q. Did you see any guy wires or other wires around him or near him? A. Only this guy wire
510 was close to him down on the deck.

Q. Close to him down on the deck?

Mr. Parnier: Referring to the guy wire running from the boom which broke to the aft, that is, the aft guy wire on the boom which broke.

That is all.

Mr. Fisch: Your Honor, I think he can go back, because I don't need this model for my questions.

The Court: All right. Tell the witness to resume his seat, Mr. Interpreter. 511

(The witness returned to the witness chair.)

Cross Examination by Mr. Fisch:

Q. How many years have you been working on that boat? A. April 29, 1939.

Q. Did you know the captain? A. Yes.

Q. Do you speak the same language he does? A. Yes.

Q. Are you a friend of his? A. I am not friends with him because I cannot be friends with the captain. 512

Mr. Parmer: I didn't hear the answer.

The Court: "I am not friends with him because I cannot be friends with the captain."

By Mr. Fisch:

Q. Have you told the captain how this thing happened? A. Yes.

Q. How many times did you tell him that? A. I told him only once. 513

Q. When was that? A. Right after the accident happened.

Q. Who told you to come here in court to be a witness? A. From War Administration, they told me.

Q. Who? What man? A. I don't know the name. When the accident happened, I was investigation, and I signed my statement. What is the man's name who called me in court, I don't know.

Q. Did the captain tell you to be a witness in
514 court? A. Yes.

Q. When did he tell you that? A. He told me to be ready for last Monday, but something happened and was postponed to Tuesday.

Q. What did you do on this ship? What was your work? A. I am a carpenter.

Q. What kind of work do you do? What do you carpenter about? Is it the deck, the tween deck, the hold or, the what? A. I do any kind of carpentry on board.

Q. Now, how long had you been watching this operation before this accident happened? A.
515 About 20, 30 minutes right after my lunch.

Q. Does your work keep you busy all day long or have you periods when you do nothing? A. Yes, there are times between.

Q. Take January. You had about ten hours of daylight. In those ten working hours, how much would you have off and how much time would you work? A. I must work eight hours a day.

Q. You told us before that you have periods when you do nothing. Do you do nothing for an hour in those eight hours? Do you do nothing for two hours or three hours or four hours, or what?
516 A. We have coffee time 10 o'clock in the morning. Then we have one hour lunch hour, between 12 and 1, and 3 o'clock P. M., we have coffee time again.

Q. And outside of the periods you have just mentioned, do you work all the time? A. No.

Q. Even between the periods, about coffee time and lunch time, and the other times, there are times you do nothing? Is that right? A. Yes.

Q. What do you do when you do nothing? Where do you go? Do you stay on deck or do you

go into some room? A. When I am not employed in my duty, I keep my tools in good order. I sharpen them, and so on. 517

Q. Where are the tools? A. They stay in the aft poop.

Q. Where is that? Is that above the deck, below the deck, or where? A. Right below aft the poop deck.

Q. By the way, were you helping these men in this work?

Mr. Parmer: "These men," you mean the longshoremen? 518

Q. The longshoremen, yes. A. No.

Q. You were watching, is that right? A. Yes.

Q. How many hatchways were there on the boat? A. Five, five cargo holds.

Q. How many years experience have you had on a boat? How many years have you been at sea? A. Nineteen years.

Q. And you have seen stevedores or longshoremen loading and unloading before, didn't you? A. Yes.

Q. And yet you were watching these men for twenty minutes? A. Yes. 519

Q. Why? A. Because I had nothing to do, and that was right after lunch hour and I had no other duties.

Q. Was this loading something new you hadn't seen before, you had to watch for twenty minutes? A. No.

Q. The five hatches on that boat were being worked at that time, weren't they? A. Yes.

Q. Then why did you pick out No. 3 hatch to watch them do the work when there were other hatches? A. I was coming from my lunch hour, which was located in forecastle.

Q. You came from your lunch but you stopped
520 in No. 3 hatch for 20 minutes. Is that correct?
A. Yes.

Q. And you had a friend with you that stopped with you?

Mr. Eisch: Will you stand up, please? That is the young boy (indicating)?

A. Yes.

Q. Did you say anything to him about, "Let us watch this thing, the way these longshoremen work"? Did you say that to him? A. Yes.

521 Q. "Let us watch"; is that right? A. Yes.

Q. Why did you ask him—why did you tell him to watch this work here at No. 3 hatch? A. We were interested to see the cargo discharging.

Q. Did it make any difference what hatch you picked out to see the cargo being discharged, whether it was 3 or 4 or 5 or 2 or 1? Did that make any difference? A. No, I didn't know accident would happen.

Q. You didn't know that, did you? A. No.

Q. You didn't wait for the accident, did you? A. No.

Q. Now, did the accident happen the first day
522 the boat was in port or had the boat come a few days before into port? A. A few days after the ship arrived in port.

Q. When you say a few days, do you mean that they were loading and unloading the ship for a day or for two or for three or for four before this man got hurt? How many days before? A. I can't remember that.

Q. Was it more than a day? A. More.

Q. Now, these booms that I am pointing to,

there are two booms, are there not, attached to a king post? A. Yes. 523

Q. Is this the front part of the ship, where I am pointing to? A. No.

Q. This is the front part? Is that correct? A. Yes.

Q. Then this boom would be the starboard or the right side of the ship, is that correct? A. No.

Q. It wouldn't?

Mr. Parmer: According to our ways of calculating, I do not know what the Latvian way is. 524

Q. Anyway, this part would be the right side of the ship? A. Yes.

Q. And this part would be the left side of the ship? A. Yes.

Q. And you came down here a few minutes before and you were showing the lawyer just what happened. Did you notice these pieces of cotton alongside the boom? Did you notice that? A. Yes.

Q. Instead of the cotton at the time of the accident the thing that held the boom in position was broke, isn't that so? A. No. That was the steel wire. 525

Q. All of these are steel wires? A. All stays and ties are wires but the cargo handling lines was rope, manila rope.

Q. The cargo handling lines was with the line wound up on the niggerheads? A. Yes, they was three inch manila ropes.

Q. And you say one of those ropes was spliced? A. Yes.

Q. What do you mean by spliced? A. By splic-

ing, I mean take end of a rope, make an eye, and
526 that short end, we twist to the rope, make an eye on the end of the rope; and that part what is spliced through, what is put through the rope, call for a splice.

Q. Do you mean splicing where you put two ends of the rope together to make one piece? A. Yes. That is a splice.

Q. This rope on the niggerhead, how many feet of rope were there on the niggerhead? A. About twenty fathoms.

Q. Will you show us here by pointing out some
527 part of this ruling one fathom, the length of one fathom?

The Interpreter: Between his two hands are one fathom.

The Court: The witness stands up and stretches both arms out as far as he can from his body.

By Mr. Fisch:

Q. And you say that this rope was twenty fathoms? A. Yes.

Q. In how many places was it spliced? A. Only
528 in one place.

Q. How do you know it was spliced? A. I can see it, because it must be done.

Q. Did you see it or do you base your opinion because it must be done? A. That must be done.

Q. Now, I am calling your attention to the niggerhead on the left side of the ship. Was the rope on the left side of the ship—rather, left niggerhead—was that the rope that was caught or was it on the right side? A. That was on the starboard side.

Q. That is this side that I am pointing to now? A. Yes. 529

Q. Is this the rope that you say got caught?

Mr. Parmer: That got caught on the drum.

Q. Was it caught on the drum? A. Yes.

Q. Now, you told the Court and jury before that the part where it's spliced got caught. Did it get caught on the drum or did it get caught up here on the boom? A. The splice got caught in the port side, top block, and the turn or twist of the rope on the niggerhead was on the starboard side. 530

Q. From the time you saw the splice get caught on the top of the boom until the man got hurt, how much time passed? A. It's hard to say, because the winch was running very fast. Maybe it is a split second's time.

Q. And in that split second, you saw the splice get caught? You saw on top of the boom, you saw the niggerhead on the right side, the coils wound in the improper manner. You saw the boom on the starboard side go all the way in a vertical or straight position. You saw the boom fall and break, and this man holding his hand. You saw all that? A. Yes, it happened, everything so fast, one after another. I saw the splice get caught in the block and the starboard boom getting up. 531

Q. When you say "block," you mean a pulley, don't you? A. Meaning by block, cargo discharging block outside of steel shield between two steel reinforcements. That shield turns around and acts, what comes through the middle of the wheel, and get tightened up on each side, on two steel reinforcing pieces.

Q. But the splices that got caught got caught
532 at the place where there is a wheel? It was on a wheel, wasn't it? A. Yes, the splice got caught on top of the wheel in the small opening.

Q. Did you look up at the top of the boom before the accident or after the accident? A. After.

Q. You did not know that this splice was going to get caught on the top of the boom, did you? A. No, I did not know.

Q. But that spliced rope had been going through that pulley, through that box, as long as you have been on board the boat, hasn't it? A. All blocks are made for a steel wire what is much smaller
533 in diameter, but longshoremens used about three inch manila rope, and splicing iron, which means in the splice place, the diameter are much larger even as the rope.

Q. Now, Mr. Witness, you say that you saw the man who got hurt do some running before he got hurt? A. No, that is not the man who was hurt, but that was the sling man who was running forward on the ship.

Q. The man who got hurt, did you see him do anything before he was hurt? A. Yes, he was handling the starboard cargo line.

534 Q. That is all he was doing? A. Yes. He was his starboard rope. There's four mens are designed to work on that No. 3 hatch: One man standing at the winch steam stop valve, one man on starboard cargo line, third man on port cargo line, and the fourth man are the sling man.

Q. Was your friend there when the accident happened? A. Yes.

Q. Were you there when the accident happened? A. Yes.

Q. Was he standing alongside of you, your

friend? A. He was about two or three feet away from me. 535

Q. He was also looking at this No. 3 hatch, wasn't he? A. Yes.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

Q. Mr. Oravs, where was this splice that you refer to which was caught in the block? Will you tell us where the splice was? A. The port side cargo line on the end is the splice located.

Q. Can you point out here on this where the splice was? A. On each end of the starboard lines are a splice made to perform like an eye. That shorter end are twisted to the rope splice and an eye made. Same thing that will be will show for port side too. On the starboard line is same eye made. These two eyes are connected together with the shackle. 536

Q. We know what a shackle is. A. And in that shackle are the cargo hooked in which one picked up the cargo from below.

Q. In other words, just to illustrate what a splice is, Mr. Oravs, you took the end of a line and bent it around, as I have done there, just making a rope? What do you do now to splice the line? A. When I bend the rope with the eye, then I open up that short end here, the rope. 537

Q. You open it up in—

The Court: Don't both speak at once. We will drive the reporter crazy.

A. I opened the short end by strands, then I twist that rope against how she is manufactured, open

up the twist [illegible] the rope, and the short ends are—
538 I am putting through, as supposed to be done. That we [illegible] the short end from coming out from the line, [illegible] in same time, the diameter or the measurements of the rope, the splice place comes larger, because there is twice as much material involved.

Q. And this splice that you say went through the heel was the splice which was at the place where the two cargo falls were joined, is that correct? A. Yes. That was the splice that was caught in the block.

Q. Will you resume the stand?

539 (Witness resumed the witness stand.)

Q. How long have you been a carpenter, Mr. Oravs? A. Seven years.

Q. Are you acquainted with good wood and bad wood? A. Yes.

Q. And is that by reason of your experience as a carpenter? A. Yes.

Q. Did you observe the broken parts of the boom after the accident? A. Yes.

Q. Was the wood at the broken parts in good condition or in bad condition? A. That was in
540 good condition.

Q. Now, I show you these two exhibits, K-1 and K-2. Will you tell us whether there is anything bad about the condition of that wood even today? A. No.

Mr. Parmer: That is all.

Recross Examination by Mr. Fisch:

Q. Now, Mr. Witness, you told us the rope was twenty fathoms long? A. Yes.

Janis Oravs—for Defendant—Recross.

Q. Now, assume that the piece that I hold in my hand is a rope, the same kind of rope that you saw on the niggerhead, and it's twenty fathoms long. If you want to make one piece out of it, you have splice both ends, isn't that so? A. Must make a splice. 541

Q. Now, this winch or the winches, the niggerheads, and the work was being done all that day the same way, wasn't it? A. Yes.

Q. And did you before the accident, let's say, at 10 o'clock in the morning or 11 or 12 or 1 watch the rope, the manila rope, go through the block on the left side of the boom, as they were working, the longshoremen were moving the cargo of cocoa beans from the hold? A. I was not watching that rope moving forth and back since 10 o'clock or 11 or 12, as you meant, but it was happened I passed by the hatch after my lunch, and I just stopped for curiosity to look at what, how much cargo more there are to discharge, and as the rope got caught or the splice got caught in the block, I remember well, because that—that happens very unusual, because so far nobody lift the load up, that is, the end of the rope. That is danger to work so high. That for the starboard boom got lifted up and the man got hit on head. 542

Q. In the twenty minutes that your watched this operation, how many times did that splice go through the block? A. That splice didn't go through the block at all, but when the splice went in in the block then the accident happens. 543

Q. Were they working during all the time you were there for twenty minutes? A. Yes. Yes, they were.

Q. Was that niggerhead on the left side worked at all for the twenty minutes? A. Of course, the port side niggerhead and the starboard side nigger-

head are running at the same time. The port side
544 man lifts the cargo up and the starboard side man pulls the cargo over the side of the ship and lowers down.

Q. Do you want to tell the jury that this is the first time the splice got into the block and the accident happened then? A. Yes.

Mr. Fisch: That is all.
The Court: You may step down.
Mr. Parmer: Just one question.

By Mr. Parmer:

545

Q. This arrangement of guy wires, the way the booms are guyed by the guy wires as shown in this model, is that the way it was at the time of the accident? A. No. It is not exactly the same because the winch, only with the difference as this niggerheads are little different on my ship as they are here on the model.

Q. I am not talking about the niggerheads or the drums. A. I am talking about this.

The Court: Didn't you have that before?
Mr. Parmer: I don't believe I did get
546 the guys.

Q. I just meant these guy wires. Is this the same way as it was at the time? A. Yes.

Mr. Parmer: That is all.
The Court: All right, step down.

(Witness excused.)

Mr. Parmer: I would like to know

whether the gangway man, Mr. Forti, is in court. 547

Mr. Forti: Here I am.

Mr. Parmer: And Mr. Paganano, the other winchman? Thank you.

BRUNO J. AUGENTI, residing at 100-07 Askan Avenue, Forest Hills, Long Island, N. Y., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer: 548

Q. Mr. Augenti, what is your business? A. Investigator and surveyor, casualty—marine casualty surveyor.

Q. What is that? A. Marine casualty.

Q. Did you go on board the Steamship Everagra on January 27th? A. I did.

Q. After this accident? A. Yes, sir.

Q. What time did you get there? A. Around two o'clock, 2:10, or something.

Q. And did you proceed to make an investigation? A. Yes.

Q. What did you find when you got there? A. 549
As soon as I got on board, I was received by the chief mate, and he took me down there to No. 3; and I saw that the starboard boom had broken about three feet off the swivel pin of the gooseneck, and the long piece was lying athwart ship on deck, and the stump was hanging down off the Sampson post.

Q. Did you arrange to take photographs? A. Yes, I did.

Q. And what arrangements did you make and

what was done pursuant to those arrangements?
550 A. Well, after my survey, I noticed certain facts which I thought had to be recorded by some kind of proofs of evidence, and I thought that the photographs would be the best way to indicate the condition which I found at the time of the investigation.

Q. And what photographs were taken and when were they taken, and were you present? A. I couldn't get a photographer the same day.

Q. When did you get one? A. So I instructed the chief mate and the captain and the other officers to watch the condition, to watch the deck as
551 a whole, and not let longshoremen touch anything, and to keep a watch throughout the night, if necessary, for the following day when I returned; and I did get back that morning, the following morning, with a photographer, and I noticed the condition was identical as they were when I left that afternoon; and we took photographs, several of them.

Q. Did you say seven? A. Several.

Q. Now, in addition to the photographs which have already been put in evidence, were these photographs taken at your request and under your
552 supervision? A. Yes.

Mr. Parmer: I ask to have that marked.
The Court: No objection, mark them.

(Photographs received in evidence and marked Defendant's Exhibits N to Q inclusive.)

By the Court:

553

Q. When you say the starboard boom broke and lay athwart ship, you mean it laid across the deck? A. That's right, between the afterbulkhead and the winch.

By Mr. Parmer:

Q. Did you do anything with respect to any of the broken wood? A. Yes, I did.

Q. What did you do? A. After inspecting the stumps and the point of fracture, I thought that it would be a good idea to cut off the stump and bring it over to the captain's room, and preserve it. 554

Q. Did you bring any piece with you? A. Yes, there were several other pieces of wood on deck, and I took a piece of sliver, and I marked it.

Q. With your own name? A. Put my name on.

Q. Is [redacted] the Exhibit K-2 there that is on the floor, that small sliver? I don't know the name of the exhibit. A. Yes, sir. That is my name.

Q. That was marked by you at the time, correct? A. That is right.

Q. Now, did you note anything with respect to the stump that was left on the mast? A. Yes, I remember I asked the captain. 555

Q. Don't tell us what you asked. What did you notice? A. Well, there was a nick, a bruise.

Q. Yes? A. And I wanted the captain to let me have that stump, but he said that he needed it.

Mr. Fisch: Wait a minute. I object to what he said.

Mr. Parmer: Never mind what he said.

By the Court:

556 Q. Did you get it from the captain? A. No, he refused to give it to me.

Mr. Fisch: We move to strike out "he refused."

The Court: Yes. That may be stricken.

By the Court:

Q. Did you get it or not? A. No, I did not get it.

557 Q. And what did you do with respect to that nick? A. Well, I had the photographer take some close-up of that particular part of the stump and also had the photographer to remove part of the wood which was stuck to the bolt, to the upper nut of the swivel pin of the gooseneck.

Q. Now, here is a photograph. Is that the close-up or one of the close-ups to which you have just referred? A. Yes, sir, and the particles of wood are still there. Some of them were removed by the photographer.

The Court: Keep up your voice, Mr.

558 Augenti.

The Witness: Yes.

Q. Will you point out the nut to which you have just referred? Defendant's Exhibit O. Is that the nut? A. The nut, of the swivel pin nut.

Q. All right. We will have an arrow drawn to it with the word "nut" written alongside it. Now, you point to certain pieces, that is, you refer to certain pieces of wood adhering to the nut, and other features at the time. A. That's right.

Q. Will you point them out in the picture? A. These are the small pieces of wood. 559

Q. All right. Now,— A. And over the nut in various places in the immediate vicinity.

Q. All right. Now, point, mark an arrow pointing to some of these pieces of wood on the swivel. A. That's right. The next thing I noticed was the bruise on the stump, which corresponded when the stump was lifted up—

Q. Yes? A. —to the nut and the swivel.

Q. And you tried that out? A. I tried that out, and they matched perfectly, which indicates that the bruise—

Q. Never mind what it indicates. It is for the jury to say. Now, did you save any of those pieces of wood referred to in the photograph? A. I did. 560

Q. Did you put them in any envelopes? A. Yes, sir

Q. Are these the envelopes with your name on it? A. Yes, sir; they are closed too.

Q. Will you open them up? First let me show this to the jury.

(Envelopes exhibited to the jury.)

Q. Now, you have here two envelopes, do you, Mr. Augenti? A. Yes. 561

Q. —One with the inscription, "Taken from the boom January 28, 1944," signed by the third mate and also by yourself. A. Yes. I had him sign and seal it. I had him seal it.

Q. Will you open that up and bring out the contents?

(Witness did as requested.)

Mr. Parmer: Could that envelope be
562 marked, please?

The Court: Mr. Fisch has no objection to marking the envelope?

Mr. Fisch: No, I haven't.

(Envelope received in evidence and marked Defendant's Exhibit R.)

Mr. Parmer: Your Honor, I offer the contents plus the envelope.

The Court: Yes, I understood that to be the offer.

563

By Mr. Parmer:

Q. Now, have you opened the second envelope? A. Yes, I have.

Q. And this envelope is inscribed, "Taken from top of nut January 28, 1944," signed by the third mate and also yourself. Right?

Mr. Parmer: May I offer this envelope and its contents too, please?

(Received in evidence and marked De-
564 fendant's Exhibit S.)

Q. Now, will you pour out the contents of that envelope, please? A. Not much (indicating).

Q. Pour it out. And that was taken from the nut? A. Yes.

Q. —Still adhering to the nut? A. Yes, right here.

The Court: Better not pass that around because that will be spilled. Just let the jurors take a look at it.

(Contents of the Defendant's Exhibit S shown to the jury.) 565

The Court: Now return that to the envelope, please.

Mr. Parmer: That is all.

The Court: Cross-examine.

Cross Examination by Mr. Fisch:

Q. Mr. Augenti, by whom are you employed? A. Presently?

Q. Yes. A. With the Marine Index Bureau.

Q. Marine, what? A. Index Bureau. 566

Q. Did you ever do any work for the lawyers defending this case? A. Not on this case, no.

Q. No, I don't mean this case, for the lawyers. A. On other cases?

Q. Yes. A. Yes.

Q. For how many years? A. Since 1926.

Q. I have seen you—

The Court: Keep your voice up.

A. 1926.

Q. I have seen you around the courts a good deal, haven't I? A. Yes, Mr. Fisch, and I have seen you too. 567

Q. You know your business, don't you?

The Court: Well, sustained.

A. It is assumed—

Q. Your business is investigating, is that correct? A. Yes, sir.

Q. You get paid for investigating? A. Yes, sir.

Q. And when you got on this ship that day, you

wanted to preserve the evidence, didn't you? A.
568 Absolutely.

Q. —Anything you thought was important? A. Yes, sir.

Q. And you thought it was important to get the top part of the boom, that is, the boom that still remained attached to the— A. Yes, sir, I thought so too.

Q. You thought that was important? But they refused to give it to you? A. Not exactly. It was explained to me, they said they needed some parts.

Q. But you knew— A. They didn't have a
569 spare.

Q. Look. Will you come down here, Mr. Augenti? A. Surely.

Q. Just stand over here so the jury can see this operation.

(Witness stands in front of the jury.)

Q. This is the part that broke off. You can see the very end over here, is that correct, Mr. Augenti? A. Yes.

Q. This part is wood, marked "wood"? A. Right.

570 Mr. Fisch: Referring to Defendant's Exhibit F.

Q. This part here is metal (indicating)? A. Metal.

Q. This part on top here is also metal? A. Yes.

Q. And then on the sides, there are two strips of metal? A. Yes, sir.

Q. Now, you know, don't you,— A. Two jaws.

Q. You know that to put in a new boom, you'd have to take this part out, wouldn't you? A. Yes.

Mr. Fisch: All right, get back now.

Mr. Parmer: Would you mind saying, 571
"Please"?

Mr. Fisch: Please. Excuse me. We are old friends. Don't worry. He can take care of himself.

(Witness resumed the witness chair.)

The Court: All right, next question.

By Mr. Fisch:

Q. Did you ever make any attempt to get any 572
part of that top piece after the first time? A. No, I did not.

Q. Though you thought it was important? A. Well, the captain explained—

Q. No. Did you think it was important? A. I thought it was a good idea to preserve that too.

Q. You brought these little shavings so that the Court and jury would get an idea of the kind of wood that was there, is that right? A. I thought in the case of litigation that those articles of wood would be important. Absolutely,—

Q. Did you know— A. —to show that the 573
boom—

Q. Did you know—

Mr. Parmer: Wait a minute. Let him finish the answer.

Q. Excuse me. Just a minute. A. To indicate that the lower part of the boom struck the pin at the gooseneck.

574 Mr. Fisch: Now, we move to strike that out and we ask that my question be read first and see whether he gave an answer in response to that.

The Court: Motion denied. Next question.

Mr. Fisch: We respectfully except.

Q. Now, so you put the wood in two envelopes, is that correct, the top and the bottom, and you ordered photographs be taken? A. I did.

575 Q. You took complete charge of everything that was to be done in the way of investigation? A. I certainly did. I took measurements, accurate measurements, as a matter of fact, of all the guys, measurements of the deck to the various shackles where the guys were fastened to and all other measurements in connection with the accident.

Mr. Fisch: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

576

VLADISLAUS V. BELOCHVOSCICKS, residing at 330 East 11th Street, New York City, called as a witness in behalf of the defendant, being first duly sworn, testified as follows through the interpreter Valdemar Volkovic, as follows:

Direct Examination by Mr. Parmer:

Q. What is your job now? A. A. B.

Q. What is your last ship? A. James Lykes.

The Court: Have a seat there, Mr. Interpreter. Maybe we won't need you. 577

By the Court:

(Witness testifying in English.)

Q. When you say A. B., you mean able bodied seaman? What nationality are you? A. Latvia.

Q. Native of Latvia? You speak pretty good English. A. Not too good.

Q. Not so good? A. Not so good.

Q. You understand the questions I am asking you? A. Yes, I understand. 578

By Mr. Parmer:

Q. Were you an A. B. on that ship? A. Yes.

Q. Is that a War Shipping Administration boat? A. Yes.

Q. Now, were you employed on the Steamship Everagra when this accident happened? A. Yes.

Q. What was your job on that boat at that time? A. The same job. A. B.

Q. Did you see the accident? A. Yes, I see the accident. 579

Q. Where were you standing when it happened? A. Close to No. 3 hatch.

The Court: Just keep your voice up.

A. Very close to No. 3 hatch, the hold where take out the cargo.

Q. Can you point out down here where you were standing? A. Yes.

Q. Will you come down and do it?

580 (Witness left the witness chair and approached the model.)

A. I been over here, port side, little bit toward the port side.

Mr. Parmer: And he is pointing to the forward edge of the hatch.

Q. Do you see where this letter is here, "OR"? A. Yes.

Q. How near to that were you? A. Port side.

581 The Court: Make your answer over again.

A. Oravs' side, I was between him and port, port side ship.

Q. What were you doing there? A. Was look down hold.

By the Court:

Q. Looking, what? A. Look down in hatch, down in hatch.

582 Q. Looking down in the hatch? A. Yes. Take out the cargo, discharging cargo.

Q. Looking down the hatch where they were discharging cargo?

By Mr. Parmer:

Q. What did you see happen? Tell us everything. A. I see happens—

The Court: Now, go slow.

A. —come out the sling. Take up sling on the side over there. I look. There is the sling, which comes too close; another time is box fell out of the slings. Look at me. At that time, I see— 583

The Court: Not so fast., Not so fast.

A. Here, take the close of the block.

By the Court:

Q. They do, what? A. Take up the—

Q. What about that "claws" of the block? A. Coming the splice in the block, in the block, and that time, I see coming this boom, come up. I jumped on port side. 584

The Court: He saw the splice in the block.

Q. Now, what else did you say? You saw the splice in the block? A. I say, this boom—

Q. You saw the starboard boom come to—

The Court: He indicates an almost perpendicular position. All right. 585

A. After that—

Q. You jumped? A. I jumped. I jumped to the port side.

The Court: He jumped to the port side.

A. Yes. The sling caught, catch.

Q. What? A. The sling fall down and catch me.

586 The Court: "So if the sling fall down it would'n't catch me."

A. For that, I jumped away.

The Court: "So, I jumped away."

Q. What happened? A. After that, that man I saw here, he slack this.

The Court: He saw the man at the winch slack.

587

A. Slack this manila line.

Q. Slackened the manila line? A. Slack the manila line sling.

Q. Slack the manila line sling? A. And this sling fell down.

Q. The sling fell down? A. And after the boom broke.

Q. And the starboard boom broke.

By Mr. Parmer:

Q. When the draft fell down, what happened to
588 the boom? A. This boom? This boom, at the same time, come down too.

Q. And is that when it broke, after it fell down? A. Yes, that, after she broke.

The Court: Anything else, Mr. Parmer?

Mr. Parmer: Just a few more questions. I think he can come on back here.

The Court: All right. Come back, Mr. Sailor, we will call him.

(Witness resumed the witness chair.) 589

By Mr. Parmer:

Q. Did you see the injured man? A. Yea. Was running the winch?

Q. Yes. A. Yes.

Q. Did you see what happened to him? A. No, sir. I no can't see. There's—

By the Court:

Q. All the lawyer asked you, did you see the man 590
that was hurt? A. The man?

Q. Yes. Did you see the man that was hurt? A. After I see him down.

Q. Down where? A. Down the deck; some guys pick him up.

Q. You saw somebody pick him up? A. Yes, pick up him.

By Mr. Parmer:

Q. Whereabouts did you see him? A. Bunker hatch, very small hatch, between the Sampson post. 591

By the Court:

Q. Between where? A. The Sampson post and the hatch, small bunker hatch.

Q. And the small bunker hatch?

By Mr. Parmer:

Q. Did you see him get hit with anything? Did you see him get hit with anything? A. No.

592 Q. Did you see where the boom went that broke? A. Yea.

Q. Where did you see it go? A. Is go between winch this bulkhead.

Q. Did you see that happen? A. Yes, I see that happen.

Q. At that time did you see the starboard winch man at the drum? A. Yes.

Q. Did you see him there when that thing went through there? A. The starboard winch man is jump a little bit back, jump a little bit back, and
593 was fall down.

Q. Did you see him jump back? A. Yes, was jump back, fall down on deck.

Q. Will you come down here and illustrate just what you saw that man do? Stand over here and tell the jury what you saw that starboard winch man do.

(The witness left the witness chair.)

A. This starboard winch man was step over here, his work.

The Court: Indicates a point in front
594 of the starboard boom.

A. Close, stay close to this winch, niggerhead.

By the Court:

Q. Close to the niggerhead? A. And after this boom go up, is jump back.

The Court: Indicating with his finger that the winchman jumped back to a posi-

tion close to the Sampson post. 595

Mr. Parmer: Yes.

A. Jumped over this side.

By Mr. Parmer:

Q. Did you see the gangway man there? A. No, I did not see.

The Court: You are talking to yourself. What was your answer? Did you see the gangway man there? Just yes or no. 596

The Witness: No.

Mr. Parmer: That is all.

The Court: All right, cross-examine.

Cross Examination by Mr. Fisch:

Q. You live in New York, don't you? A. Yes; when the ship is here, I live in New York.

Q. Your friends call you some name. What is the short name they call you when they want you? A. Walter.

Q. Walter? Fine. Now, Walter, you saw this model before you came to court, didn't you? A. 597 Yes.

Q. Where did you see it? A. Tuesday.

Q. Where? A. In office, Broadway.

By the Court:

Q. Lawyer's office? A. Yes.

Q. Lawyer's office? A. Broadway, 120.

598 *By Mr. Fisch:*

Q. Who was in the lawyer's office?

By the Court:

Q. This lawyer here? A. Yes.

The Court: Indicates Mr. Parmer.

By Mr. Fisch:

599 Q. Was the captain there? A. The captain there.

Q. The captain was there too? And you talked about where you were, how the accident happened, didn't you? A. No, I got—I gave him, just after accident, I got—they gave me to read before.

The Court: Wait a minute. Just "They gave me what I said after the accident to read before."

Q. You were there with the carpenter, weren't you, No. 3 hatch? A. Yes.

600 Q. Were all the hatches working? A. All after one o'clock, is all hatch work.

Q. All hatches working, but you stopped at No. 3 hatch, is that right? A. That is right.

Q. You and the carpenter? A. Right.

Q. And he told you, "Let's see the work." Is that right? A. Just come from forward where is our storeroom; got the back, the carpenter room, this carpenter—

201

Vladislaus V. Belochvoscicks—for Defendant—Cross.

By the Court: 601

Q. You are going back aft where the carpenter lives, is that right? A. Yes, right.

By Mr. Fisch:

Q. How long did you stay there in one place? A. I been there a couple of minutes.

Q. Why did you watch this work? A. Small hatch, smallest hatch in ship, and every time—

By the Court:

Q. Smallest on ship? A. Cargo hatch. 602

Q. Smallest cargo hatch on ship?

By Mr. Fisch:

Q. Go ahead. "And every time,"—you said—go ahead. A. Every time this hatch discharging fast out, was looking in, just how much is left there, the cargo.

The Court: "The hatchmen were discharging fast, so I looked in to see how much was left there."

603

Q. You could look at the other hatches too, couldn't you? A. Yea.

Q. But you saw the splice get caught on top, didn't you? A. Yes.

Q. That's right. And you saw the rope on the starboard side on the niggerhead wind around, didn't you? Saw that too, didn't you? A. Yes.

The Court: The answer is "Yes," Mr. Reporter.

Q. And then you saw this starboard boom go
604 up in the air? A. Yes.

Q. Then you saw this starboard boom go down? A. Yes.

Q. You were there, weren't you? A. What?

Q. You were there? A. Yes, I been there.

Q. Sure about that? A. Sure.

Q. What hatch was it? A. No. 3 hatch, bunker hatch, call him bunker hatch.

Q. With your friend the carpenter? Is that right? A. Right.

605 Mr. Fisch: That is all.

The Court: All right. You may step down.

(Witness excused.)

The Court: We will take a short recess.

(Short recess taken at this point.)

MARCUS E. ROUGH, residing at 115 Fox Boulevard, Massepequa, Long Island, N. Y., called as
606 a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Rough, what is your business? A. Steamship business.

Q. Who are you employed by? A. At the present time I am employed by War Shipping Administration.

Q. And what is your position with War Shipping Administration? A. Assistant to the Atlantic Coast Director. 607

Q. And what is your function in connection with being such assistant? What do you do? A. I have two principal jobs, one of which is managing homeward employment; the other of which is to assist the Director in administrative matters.

Q. Now, will you tell us just what homeward employment means? A. Homeward employment is all ships heading this way. It is my position to keep track of them for all divisions of the War Shipping, tell people where they are going, what is on board them, and when they will get there, and also to divert them when too many of them go to one port, divert them to other ports that can handle them. 608

Q. You do that work yourself? A. Yes, sir.

Q. What do you do in connection with these administrative matters? A. Administrative matters are matters of organization and the setup of War Shipping Administration as promulgated in all general orders and regulations, and it is my position there to deal with the agents and other divisions of War Shipping, and other agencies, and the public, as to the application of the general orders and regulations. 609

Q. And do you exercise any of the powers of the Director of the Atlantic Coast of the War Shipping Administration, Atlantic Coast Division of the War Shipping Administration? A. As I understand my position, what I do, I do in the name of the Director, and many of those things I do prior to his knowledge or without his knowledge.

Q. And he has delegated to you to exercise his authority in that respect, is that correct? A. That is right.

610 Q. Now, are you acquainted with the divisions with respect to ship operation— A. I am.

Q. —of the War Shipping Administration? A. I am.

Q. Will you tell us what the divisions are and the functions of each? A. The principal divisions, the Deputy Administrator, for ship operations has most of the operating units of War Shipping under his control.

Q. And who is he? A. That is Captain Conway, who was formerly Atlantic Coast Director up here.

Q. Stemming from him, how is it divided? A. 611 The Division of Marine Operations, Divisions of Traffic, Maintenance and Repair Division, Division of Foreign Salvage and Repair. There is a Division of Ship Warrants, I believe. I am not sure it is a division. All of those setups in War Shipping are covered by what are called administrative orders.

Q. What is your business with respect to those administrative orders? A. I do not have much to do directly with administrative orders, except that they are the thing that sets up the functions of the different departments.

Q. And are the functions of the different departments set forth in those administrative orders? 612 A. They are.

Q. Have you brought them with you? A. I have brought Administrative Order No. 50, which is the organization underneath the Assistant Deputy— the Deputy Administrator, rather, of ship operations.

Q. Does that set forth the functions of the different departments that you have described with respect to the operations of these War Shipping Administration vessels? A. It does.

Q. Have you got it here? A. Yes, sir.

Q. Will you refer to it and tell the Court and jury what the functions were of these two divisions, the Division of Operations or the marine operation section, and the Division of Maintenance and Repair. 613

Mr. Fisch: As to when?

Mr. Parmer: Well, as of the period prior to January 27, 1944.

The Court: January 27th, is that right?

Mr. Parmer: That is right. That is the date of the accident.

A. January 26th? 614

The Court: January 27th.

A. There happens to be a supplement to this order effective January 27th.

Q. Have you the original order and the supplement? A. I have here the original administrative order No. 50 and supplements 1 through 6, which are issued in sequence up to January 27, 1944.

Q. Now, can you—I don't want you to read the whole thing because it is probably too lengthy, but can you refer to that part of it and read it to us, that deals with the functions set up by the War Shipping Administration for those two divisions? A. Working backwards on this from the January date, supplement— 615

Mr. Fisch: What date?

The Witness: January, 1944.

A. (continuing) Working backwards from January 1944—

Mr. Fisch: May we not have the date?
616 What day in January?
The Witness: The date of your accident.
The Court: January 27th?
The Witness: January 27th.
The Court: All right, go ahead.

A. Supplement No. 4, issued November 13, 1943, appointed Mr. Gerald Helmbold Assistant Deputy Administrator for shipping operations, reporting directly to the associate Deputy Administrator, Grenville Conway.

617 (Contents read by the witness.)

A. (continuing) Are you interested in the repair?
Q. Yes. A. Maintenance and repair?
Q. Yes, I want to know.

Mr. Fisch: And the date.
The Court: Just the regulations which govern repairs as of January 27, 1944. Is that the information you seek to elicit?
Mr. Parmer: Yes.

By the Court:

618 Q. What were the regulations in force and effect with reference to repairs and replacements on January 27, 1944? A. Supplement No. 2 to Administrative Order 50, issued July 29, 1943, No. 1.
(Contents read by the witness.)

By Mr. Parmer:

Q. Mr. Rough, will you turn to Administrative Order—

The Court: These orders that the witness is referring to are part of Exhibit 6? 619

Mr. Parmer: Exactly.

Mr. Fisch: That is all I want to know.

The Witness: The original setup of Maintenance and Repair Division is covered by Administrative Order—

By Mr. Parmer:

Q. Order 50, Supplement 1, issued on July 29, 1943. Have you got that? A. That is the Division of Operations, July 29, 1943.

Q. Does that describe the duties and functions of the Division of Operations? A. It does. 620

Q. Have you read that yet? A. Yes, sir. Not just now, I haven't.

Q. I want you to read it to the jury. A. This is rather lengthy.

The Court: Go ahead. Read it. Take your time. Go slowly. Speak distinctly.

(Contents read to the jury by the witness.)

Q. Mr. Rough— 621

The Court: Direct his attention to such portion as you consider material.

Mr. Parmer: That is what I want to do, just to save time.

Q. I want you to read that portion of this Administrative Order No. 50, Supplement 1, which deals with marine operations section. A. Marine operations section, H. W. Jackson, Manager. (Contents read to the jury by the witness.)

Marcus E. Rough—for Defendant—Direct.

Q. Now, I want you to turn to the stevedoring section.

622

(Contents read to the jury by the witness.)

Q. Now, have you got Administrative Order No. 50, dated July 29, 1943? A. I have.

Q. Would you read that section which deals with the Division of Maintenance and Repair?

(Contents read to the jury by the witness.)

Q. And you tell us that this was in force as of
623 the time of this accident in January 7, 1944, is that correct? A. Yes.

The Court: What about No. 6, Plaintiff's Exhibit 6?

Mr. Parmer: Your Honor, this is a Maintenance and Repair regulation which was issued pursuant to the authority of the setup just shown by Administrative Order No. 50.

By Mr. Parmer:

Q. If you refer to that and others as well before
624 we get to the M. & R. regulations, I want to deal with the operating regulations. As a result of the setup on the one hand of your operating divisions or marine operation section and your M. & R., Maintenance and Repair Division, have various regulations been issued governing the activities of those principal divisions? A. Each of the divisions of War Shipping issues its regulations to the agents and for the information of the rest of War Shipping as to their method of operation and what they require.

Q. Now, have you brought with you the operating regulations? A. I have. 625

Q. Have you operating regulation 16, issued on October 8, 1942? A. Unless it's mis-filed, I haven't got it.

Q. Have you got it with you? A. I have operations 15 and 16, seem to be combined here, and the original 15 and supplement 16 are here, supplement 1 to 16 and 2.

Q. Let me see it. Maybe you have what I mean. A. What date?

Q. Issued on October 8, 1942. It is combined with operating regulation 15. A. The original one 626
is missing, Supplement 1. I am sorry about that. This is supposed to be the complete file.

Q. We will skip that and we will get that later. Have you Operation Regulation No. 20 issued on November 16, 1942? A. Yes, sir.

Q. Was that in force in January, at the time of the accident? A. It hasn't been amended or cancelled.

Q. Was it therefore in force? A. It was therefore in force.

Q. Will you read it, please? A. (The witness read the contents to the jury.)

Q. Now, will you turn to Operation Regulation 627
No. 48, issued on March 8, 1943? A. Yes, I have it.

Q. Was that in force and in effect in January at the time of the accident? A. The original operations 48 was not.

Q. Was it amended? A. Operations Regulation 48, revised, issued June 1, 1943.

Q. Very good. Will you read that one? This is 48, revised, issued on June 1, 1943, correct? A. Correct.

(Contents read to the jury by the witness.)

628

Mr. Fisch: Your Honor, may I request, I would like to get this. I didn't get this bulletin, the date, and when it was issued, and what department.

The Witness: This is Operations Regulation 48, revised, issued June 1, 1943.

Mr. Fisch: By whom?

The Witness: Signed by Mr. W. N. Westerlund.

Mr. Fisch: Who is he?

629 The Witness: Assistant Deputy Administrator for shipping operations.

By Mr. Parmer:

Q. Now, I want you to turn to Operating Regulation No. 30, issued on January 2, 1943. Tell us first whether that was in force at the time of the accident. A. Yes, sir. This is Operations Regulation No. 30, issued January 2, 1943.

Q. Will you read it, please? A. "Subject: Securing covers on cargo deep tanks."

630 Mr. Parmer: Your Honor, I have a number of regulations similar to this which I am offering for the purpose of showing that the War Shipping Administration sends instructions to general agents to turn over the War Shipping Administration instructions to the captains. They act as an intermediary for the handing on of instructions.

By Mr. Parmer:

Q. Will you read it, please? A. (Contents read to the jury by the witness.)

Q. Will you turn to Operating Regulation No. 32, issued on January 18, 1943? First, was it in force at the time of the accident? A. No, it was not. 631

Q. Was there any amendment to it, which was in force? A. Supplement No. 1 states that Operations Regulation 32, issued January 18, 1943, is hereby rescinded.

Q. When was it rescinded? A. March 25, 1943.

Q. Then skip it. Will you turn to Regulation No. 41, issued on February 12, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was. 632

Q. Will you read just the first paragraph? A. (Contents read to the jury by the witness.)

Mr. Parmer: Now, unless you wish, Mr. Fisch, I shall not continue with reading the rest of that thing.

Mr. Fisch: You can stop now.

By Mr. Parmer:

Q. Now, Operating Regulation 42, February 16, 1943. A. That was issued January 16, 1943, and was in effect. Subject: "Safety precautions aboard merchant vessels." 633

Q. Will you read that? A. (Contents read to the jury by the witness.)

Q. Which regulation was that? A. Operations Regulation 42.

Q. Have you Operating Regulation No. 43? A. I have.

Q. Dated February 16, 1943 or— A. That is correct, February 16, 1943.

Q. Will you read the second paragraph? A. (Contents read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation
634 46, issued on March 4, 1943? A. I have it.

Q. Was that in force at the time of the accident? A. Yes, sir, it was.

Q. Would you read it, please? A. (Contents read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation 50, issued on March 10, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was, and as amended by two supplements issued in between.

Q. Now, will you read this second paragraph of the original regulation of March 10, 1943?

635

Mr. Fisch: Your Honor, he says there were supplements issued which amended the original in between. Does he mean before the accident? If it was before the accident, then the supplements should be read and not the original which is amended.

Mr. Parmer: The supplements are in the nature of additions, Mr. Fisch.

Mr. Fisch: But if they change the original—supposing you ask this witness that. If he says no, all right.

The Witness: There is nothing in the two
636 supplements issued that affects this particular paragraph.

By Mr. Parmer:

Q. Will you read that? A. (Contents read to the jury by the witness.)

Q. That is enough. Operating Regulation No. 51 on March 31st and April 2, 1943. I have a double date on that. A. 51?

Q. Yes. A. Operations Regulation 51 is issued December 21, 1943. 637

Q. That is 51, Supplement 2, isn't it? A. Yes, 51 is March 31st.

Q. Would you read the last paragraph? Was it in force at the time of the accident or was it changed by any of the supplements that you refer to? A. It is amended somewhat by Supplement 2.

Q. Will you read it in its amended form, the corresponding portion? A. The subject of this regulation is the pollution of navigable waters of the United States.

Q. Yes. What is the general agent told to do with respect to that? A. (Contents read to the jury by the witness.) 638

Q. Now, will you turn to Operating Regulation No. 52, dated April 22, 1943? A. I have it.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read that portion of it which directs the general agent to do something? A. "General agents are therefore directed to instruct Masters of all vessels under control of the War Shipping Administration to keep shaft alley doors closed at all times, except when it becomes necessary to fill bearing reservoirs or to make repairs." 639

Q. Will you turn to Operation Regulation No. 51, issued on May 3, 1943? A. What number was that, sir?

Q. 54. I am sorry. A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read that portion of it which directs the general agent to do something? A. (Read to the jury by the witness, beginning with the words "Complaints have been received.")

Q. Operating Regulation 55, issued on May 10,
640 1943. A. I have it.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read that portion which instructs the general agent to do something? A. (Contents read to the jury by the witness.)

Q. Will you read the rider? A. (Contents read to the jury by the witness.)

Q. Will you turn to Operations regulation 56, dated May 12, 1943? A. Yes, sir.

641 The Court: Ladies and gentlemen of the jury, at this point we will adjourn until tomorrow at 10 o'clock. Do not discuss the case among yourselves. Do not permit anybody to discuss it with you. Do not visit the scene of the accident. Ten o'clock tomorrow morning.

(Whereupon an adjournment was taken to Friday, June 8, 1945, at 10 A. M.)

642

Friday, June 8, 1945

TRIAL RESUMED

(Same appearances)

MARCUS E. ROUGH, resumed the stand and testified further as follows: 643

Direct Examination by Mr. Parmer:

Q. Mr. Rough, have you brought with you this morning Operation Regulations 15 and 16, which you didn't have yesterday? A. I have.

Q. Will you turn to Operation Regulation 16, issued on October 8, 1942, and, as we did before, will you tell us whether it was in force as of the day of the accident? A. Operations Regulation 16 is issued on October 12, 1942, and attaches a directive to all agents, dated October 8, 1942. 644

Q. Was it in force at the time of the accident? A. It was.

Q. I wish you to read from the directive, second numbered paragraph. Read it so that everybody can hear it, please. A. (Contents read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation No. 15, please? A. Operations Regulation No. 15, dated October 10, 1942, subject of discipline aboard vessels owned by or chartered to the War Shipping Administration.

Q. Was that in force at the time of the accident? 645
A. It was.

Q. Will you read the first five paragraphs of Directive No. 1 attached to that, please? A. (Read to the jury by the witness.)

Q. Now, will you turn to Operating Regulation No. 56, dated May 12, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was.

Q. Will you read the first paragraph of it which deals with the instructions to the general agent? A. (Read to the jury by the witness.)

Q. Now, Operating Regulation 58, dated May
646 28, 1943. A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was, as amended by Supplement 1, issued September 18, 1944.

Q. Well, September 18, 1944, would be after the accident, wouldn't it? A. That is right.

Q. The one that was in force at the time of the accident would be this, the original? A. The original.

Q. Now, what is the subject of that regulation? A. "Status of military and naval personnel assigned for duty aboard War Shipping Administra-
647 tion vessels during period when the vessels are not assigned or wholly employed by the Army or Navy."

Q. Now, will you read the last paragraph of that? That is on page 2. A. (Same read to the jury by the witness.)

Q. Now, Operating Regulation 59, dated May 31, 1943? A. Yes, sir.

Q. Was that in force at the time of the accident? A. 59?

Q. Yes. May 31st. A. Yes, sir.

Q. Did you say it was in force at the time of the
648 accident? A. The accident was—

Q. —January 27, 1944. A. Supplement 1, dated January 12th.

Q. Does that take its place or is it in addition thereto? A. No, sir. Supplement 1 only extends the provisions of the original regulation to ferryboats and small craft.

Q. Turning to the original regulation,— A. Yes, sir.

Q. Would you read that, please? A. (Contents read to the jury by the witness.)

Q. Operating Regulation No. 62, dated June 9, 1943. Have you got it? A. Yes. 649

Q. Was that in effect at the time of the accident? A. It was.

Q. Will you read that, please, in full? A. (Contents read to the jury by the witness.)

Q. Operating Regulation No. 63, dated June 23, 1943? A. Yes, sir.

Q. I believe the revision of that was in 1944, June? A. It was revised June 27, 1944.

Q. —Which was after the accident; so was this one, June 23, 1943, in force at the time of the accident? A. It was. 650

Q. What is the subject of that? A. The subject is, "Crews Employment of staff officers."

Q. Will you read the second paragraph, please? A. (Read to the jury by the witness.)

Q. Next paragraph, please? A. (Read to the jury by the witness.)

Q. The next two paragraphs, please? A. (Read to the jury by the witness.)

Q. July 2, 1943, Operating Regulation No. 65. Was that in force at the time of the accident? A. That one was. It has subsequently been cancelled and I do not have the cancelled one with me.

Q. When was it cancelled? A. January 6, 1945. 651

Q. It was in existence in 1944? A. It was in existence and in effect then, but it was withdrawn from here when it was cancelled.

Q. Is this the original which I hand you? A. Yes, sir.

Q. Will you read the first, second, and last paragraphs—not the first, second, but the second, third, and last, please? A. (Same read to the jury by the witness.)

Q. Regulation No. 75, November 2, 1943, please?

A. That is a similar case to the last one. I do not
652 have the original which has been supplemented in 1944.

Q. Do you know what date it was supplemented in 1944? A. June 2nd.

Q. So this one was in effect as of the day of the accident? A. Yes, sir.

Q. I hand you this paper. Is this the operations regulations? A. It is.

Q. What is the subject? A. "Information required and procedure for payment of wages, etc., when ship's papers are lost."

Q. Will you read these four paragraphs that I
653 point out here?

(Read to the jury by the witness, commencing with the words, "In the event any vessel owned by or bare boat chartered to the War Shipping Administration is lost."

Q. Operating Regulation 76, November 6, 1943. A. Yes, sir.

Q. Do you have that? A. Yes, sir.

Q. Was that in force as of the time of the accident? A. Yes, it was.

Q. What is the subject of that? A. "Prisoners of war."

Q. Will you just read that paragraph which deals
654 with what the general agent or agents are supposed to do? That is the first paragraph. A. (Read to the jury by the witness.)

Q. That is all for that. Operations Regulation 78, dated November 17, 1943. A. Yes, sir.

Q. Was that in force as of the time of the accident? A. It was.

Q. What is the subject of that? A. "Payment of repatriation wages to crew members after return to port of shipment."

Q. Will you read the last paragraph, beginning at the bottom of page 1? A. (Read to the jury by the witness.) 655

Q. Operations Regulation 79, dated November 25, 1943. A. Yes, sir.

Q. Was that in force as of the time of the accident? A. It was.

Q. What is the subject of it, please? A. "Certificates of loading explosives or other dangerous cargo."

Q. Will you read the first and third paragraphs? A. (Read to the jury by the witness.)

Q. Operations Regulation 81, December 4, 1943. 656
A. Yes, sir.

Q. Was that in force at the time of the accident? A. It was.

Q. What is the subject? A. "Convoy conferences."

Q. Will you read the first three paragraphs? A. (Read to the jury by the witness.)

Q. Now Operations Regulation 82, December 8, 1943? A. Yes, sir.

Q. Was that in force as of the date of the accident? A. Yes, sir.

Q. What is the subject? A. "Crews. Use of merchant radio operators to replace United States 657
Naval radio man."

Q. Will you read the second paragraph? A. (Read to the jury by the witness.)

Q. Now, will you read the next to the last paragraph on the same page? A. (Read to the jury by the witness.)

Q. Now, the next paragraph, please? A. (Read to the jury by the witness.)

Q. Now, Operations Regulation No. 83, December 11, 1943. A. Yes, sir.

Q. Was that in force at the time of the accident?
658 A. It was.

Q. What is the subject? A. "Bunker fuel oil, measurement of quantities, bunkered or discharged."

Q. Just read the first paragraph, please. A. (Read to the jury by the witness.)

Q. Would you turn to Operations Regulation No. 1, dated July 13, 1942, please? A. Yes, sir.

Q. Was that in force at the time of the accident? A. Dated when, sir?

Q. July 13, 1943. A. I have Operations Regulation No. 1, dated May 25, 1942.

659 Q. Was that a revision? A. It does not indicate so. I have no prior copy.

Q. That is the one I refer to. Was that in force at the time of the accident? A. Yes, sir.

Q. What was the date of it? A. May 25, 1942.

Q. I want you to read the last paragraph. What is the subject of it? A. "Policy with respect to seagoing personnel."

Q. What is the last paragraph there? A. (Read to the jury by the witness.)

Q. Now, will you read the first page of this statement on policy, please? A. (Contents read to the
660 jury by the witness.)

Q. Now, will you turn to the next page, which deals with wages and working conditions and discipline? A. Yes, sir.

Q. Will you read that, please? A. (Contents read to the jury by the witness.)

Q. Who was that signed by? A. That is signed on behalf of the National Organization of Masters, Mates and Pilots of America, James J. Delaney; on behalf of the National Marine Engineers Beneficial Association, S. J. Hogan.

Q. Yes? A. For the War Shipping Administration, by Admiral E. S. Land and Edward McCall, 661
and William Radner.

Q. Now, were similar statements of policy put into effect with respect to the employment of the subordinate members of the crew? A. Yes, sir.

Q. Such as the seamen and the men who work in the engine room, the men who work in the galley? A. The second statement hereunder, reading the same, is signed by E. S. Land, Edward McCall, for the War Shipping Administration, by Harry Landburg, Secretary-Treasurer, Sailors' Union of the Pacific and President, Sailors' International Union; John Hawk, Secretary-Treasurer, Atlantic 662
and Gulf District Seafarers' International Union; V. J. Maloney, Secretary, Pacific Coast Marine Firemen's, Oilers' and Water Tenders' Association; and James W. Dork, Secretary, Marine Cooks and Stewards Association, signed in Washington, May 4, 1942.

Q. Have you Operation Regulations No. 2, revised as of August 21, 1942? A. Operations Regulations No. 2, revised as of August 21, 1942. "Vessel casualties."

Q. Was that in force at the time of the accident? A. Yes, sir. 663

Mr. Parmer: I see nothing particularly significant there. I withdraw it.

Q. Will you turn to Operation Regulation No. 4, dated June 22, 1942? A. Yes, sir.

Q. Was that modified by a supplement No. 1, dated July 12, 1943? A. Yes, sir.

Q. What was the subject of both regulations? A. "Employment of officers and crews on new ships."

Q. Will you read the modification as of July 12,
664 1943? A. "Effective as of this date, Operation Regulation No. 4, dated June 12, 1944, is hereby cancelled."

Q. 1942. A. 1942, excuse me. "In the future, the advance assignment of personnel to newly constructed vessels will be made by general agents in accordance with a letter of instructions from the manager marine operations, War Shipping Administration, to be issued in each case."

Q. And do you know that that is the practice in each case?— A. Yes, sir.

Q. —Or was at that time? Did you issue a let-
665 ter of instruction in each case? A. Yes.

Q. Operation Regulation No. 6, August 20, 1942. A. Yes, sir.

Q. Was that in force at the time of the accident? A. As amended by Supplement 1, August 24, 1942.

Q. Well, referring to that, what is the subject of that? A. "Degaussing information and instructions for merchant vessels."

By the Court:

Q. Tell the jury what degaussing is. A. Degaussing is a method developed early in the war.

666 Q. Protection against submarines? A. Neutralizing the magnetic effect of magnetic mines.

By Mr. Parmer:

Q. Will you read Regulation No. 6, the original one issued on August 20, 1942; that is, the last paragraph?

(Read to the jury by the witness.)

Q. Operation Regulation No. 9, Supplement 1, December 29, 1942. A. December 29, 1942, is Supplement 1. 667

Q. Operation Regulation No. 9, Supplement 1, was that in force at the time of the accident? A. It was.

Q. Will you read that, please? A. (Contents read to the jury by the witness.)

Q. Now, Operations Regulation No. 12, September 12, 1942. A. I have a typewritten substitute copy of it. Do you have the original?

Q. Let us see if that is the same. A. Yes, sir.

Q. Was that in force at the time of the accident? A. Yes, sir. 668

Q. What does that deal with? A. "Cleaning cargo holds in preparation for cargo, scaling, painting, and cleaning boilers and bilges."

Q. Will you read it? A. (Contents read to the jury by the witness.)

Q. Operation Regulation No. 13, dated October 7, 1942. A. I am sorry that one is missing.

Q. I hand this to you. A. Yes, sir.

Q. Was that in force at the time of the accident? A. I don't have any existing supplement that would cancel it.

Q. Does that mean it was in force? A. I believe so. 669

Q. What is the subject of that? A. "Slop Chest."

Q. What does that mean? A. That is, the slop chest is the crew's commissary for cigarettes and clothing, miscellaneous equipment.

Q. What is the general agent directed to do with respect to that?

(Read to the jury by the witness.)

Q. Have you got with you General Order No. 12,
670 revised? A. Yes, sir.

Q. Skip it. I note it's dated May 27, 1944, which is after the date of the accident. Now, do you have Maintenance and Repair Regulation No. 3? A. I don't have the Maintenance and Repair regulations with me.

Q. Do you recognize it, when I show it to you?

Mr. Fisch: Mr. Parmer, what is the date of that, please?

Mr. Parmer: I will give you the date, November 15, 1943.

671

A. Yes, sir. That is signed by hand on the stencil by R. T. Lemon, Director of the Maintenance and Repair Division.

Q. Was that in force at the time of the accident in January, 1944? A. Without the files here, I wouldn't know whether there was a supplement issued. I would believe so.

Q. Subject to proof to the contrary—

Mr. Fisch: Your Honor, we must object to any of this. Without the file, he wouldn't know whether there was any supplement
672 issued. Under those circumstances, we do not know whether this is in effect.

Mr. Parmer: We have a supplement which takes care of it.

Mr. Fisch: All right.

The Court: Objection withdrawn.

By Mr. Parmer:

Q. I show you supplement issued on December 4, 1943. A. Yes, sir.

Q. Is that a supplement, Maintenance and Repair regulation No. 3, which I showed you previously? A. Yes, sir. 673

Q. Does it change it in any respect? Is it a modification or an addition? A. It appears to add further information for the guidance of the general agents, including the terms of repair contracts.

Q. That is, it's an addition? A. An addition.

Q. Now, will you just read—tell us what the subject of this thing is, and then read paragraphs A, B and C.

(Contents read to the jury by the witness.) 674

Mr. Fisch: May we have that, please? Have you a copy of that?

Mr. Parmer: You can have that.

By Mr. Parmer:

Q. Mr. Rough, in addititon to the written regullations and orders, some of which you laboriously read, are oral instructions given from time to time by the War Shipping Administration to the general agents? A. Constantly.

Q. And who in the War Shipping Administration gives such orders to the general agents, oral orders? A. In accordance with the organization, the prime authority, of course, would be the District Director under whom the heads of the different divisions and persons designated by them will call the agents on the telephone and speak to them personally and give them orders which may or may not coincide with the written orders. 675

Q. You mean to say that these written orders from which you have read are subject to change from time to time by oral instructions? A. Yes, sir.

676 Q. Is there any way of knowing what the instructions of the general agents are at any particular time in view of the practice of giving them oral instructions which may contradict the written? A. The written regulations such as oper. ting regulations, which are the regulations of the ship operations divisions, are always subject to amendment or change by the person who wrote them, and they may supplement it for general distribution or they may directly advise an agent to do to the contrary in a particular case that happens to warrant particular attention.

677 Q. Do these practices of the War Shipping Administration, as enforced with general agents, vary from district to district by reason of that fact? A. In some respects, they may. They do, in some respects. For the most part, operations regulations emanating from Washington are not countermanded by District Directors without very good and extraordinary reason.

Q. Now, who is in your organization who has the power or the authority to complain to the general agent that he is not living up to his contractual agreement? A. Such complaints would emanate with respect to different departments of the operation with the managers of those departments. In
678 connection with the matters that I have been reading from the operation regulations, those complaints would originate with the Manager of Marine Operations, in connection with operations, and the Marine Superintendent in connection with crew matters.

Q. And who has the supervisory capacity over all of these managers of the various departments? A. In the Atlantic Coast district, it's Captain Hewlet Bishop, Atlantic Coast Director.

Q. What relation do you bear to him? A. I am his assistant. My title is Assistant to the Atlantic Coast Director. 679

Q. Do you in that capacity exercise his authority in dealing with the general agents and objecting when they are not toeing the mark, so far as their contractual obligations are concerned? A. I do.

Q. On behalf of the United States, do you pass on the matter of whether they do or do not perform their contractual obligations? A. I do, not in all matters. I wouldn't, for instance, step in to the matters on which we have a Manager of Marine Operations, when he is available to handle his own work; but there are many phases of the general agency agreement which are not strictly operations and require a department to run. 680

Q. Now, are you familiar with this GAA agreement? A. Yes, sir.

Q. I call your attention to the—

Mr. Fisch: 326.

Mr. Parmer: Thank you.

Q. I call your attention to Article 3A, sub A. A. I would rather read it from here, which is the official copy.

Q. Very good. I want to read just that section. Then I want to ask a question. 681

(Read to the jury by the witness.)

Q. You know what that means? A. Yes, sir.

Q. It refers to a vessel that has been chartered to you on a bare boat basis? A. That does refer to a vessel which we charter on a bare boat basis.

Q. Just read that Subdivision A. A. The preamble to this paragraph is:

(Contents read to the jury by the wit-
682 ness.)

Q. Do you define from time to time for the benefit of general agents what "reasonable commercial practices" are? A. In a manner of speaking, we define it. If the agent does something not covered by a regulation, which we don't think is good commercial practice, we will tell him so and overrule him, tell him to do otherwise.

Q. That is your function, is it? A. Yes, sir, and the functions of the different departments.

Q. I want to know, is your function on behalf
683 of the United States to so define commercial practices for the benefit of the general agent? A. Yes, sir.

Q. And how much experience have you had in the shipping business before you went with the W.S.A.? A. About 16 years before I went with War Shipping. I have been with War Shipping for two and a half years.

Q. What was your experience in the commercial world? A. In 1927 I started with the old Munson Line. I was with McCormack Steamship Company when Munson and McCormack parted com-
684 pany on joint services, and then I was with the Weyerhouser Steamship Company, Pacific Coast, direct line for the manager part of that time, principally engaged in fruit traffic work; government regulation solicitation, including one year, 1941, spent working on the piers as assistant superintendent, plant clerk.

Q. Are you acquainted with the practice on Merchant ships of the master or the chief engineer and the stewards, chief steward, preparing requisitions on repairs which are turned in at the close of a

voyage? A. Yes, sir. I have never worked in a marine operations department. 685

Q. But are you acquainted with that commercial practice? A. Yes, sir.

Q. Is that one of the reasonable commercial practices approved by the Government in the operation of its ships? A. It is a practice continued that, at the termination of a voyage, the chief officer, chief engineer, file requisitions and reports on repairs that are necessary.

Q. Is that approved by the W.S.A. for the operation of their ships? A. Yes, sir. I believe it is required. 686

Mr. Fisch: Does he know that himself? He is not in that department even.

Mr. Parmer: He says he is acquainted with the practice and he says it is approved.

A. As a matter of fact, I believe I haven't the repair regulations with me, but I believe it's required by one of the repair regulations, that the agent shall obtain a list of repairs from ship's officers.

Q. Now, assuming that the agent obtains such requisitions for repairs at the close of a voyage from the ship's personnel and arranges for the performance of the repairs so required, is that acceptable performance—Is that performance of the contract, the GAA contract, acceptable to the United States as full performance of the contractual obligation? 687

Mr. Fisch: Just a moment, please. That is a matter of law, your Honor pleases. We object to having this witness interpret cer-

tain provisions of contracts, and so forth.

688 The Court: Sustained.

Mr. Parmer: That is all, Mr. Rough.

Mr. Fisch: May we have from Mr. Parmer, I want Regulation, Operation Regulation 48, revised, issued June 1, 1943, signed by W. N. Westerlund.

Mr. Jorda: It is Exhibit 6.

Mr. Fisch: You have it over there.

Mr. Parmer: He has it here. He will produce it for you.

The Witness: I have it.

689 The Court: He has it, Mr. Fisch.

The Witness: 48.

Cross Examination by Mr. Fisch:

Q. 48, revised, Operator's Regulation 48 revised, and issued June 1, 1943, signed by Westerlund. A. Correct, I have it.

Q. Let me have it, please. I will give it back to you before you leave. I won't be very long. Mr. Rough, you have read a great many regulations issued by some part or some department of the United States Government, is that correct? A. Yes, sir.

690 Q. Now, what department are you in? A. I am not in one of the organization departments. I am assistant to the Director; in other words, I am in a field capacity. The Director is over all departments in his district.

Q. The Director of what? What is his name? A. Captain Bishop, he is the Director of the Atlantic Coast district. That includes everything from Halifax to Jacksonville.

Q. You have for a considerable length of time

read these regulations and you are referring to general agents? A. Yes, sir. 691

Q. Were you referring to these agents mentioned in the general agency agreement, GAA 4-42? A. Yes, sir.

Q. And when you read these rules and regulations saying "The general agent shall" and "The general agent shall do this," you were referring to the person or the corporation in that agreement, were you not? A. Yes, sir.

Q. Now, when you mentioned the general agent shall hire certain persons for the boat,— A. Yes, sir.

692

Q. —did that refer to any particular part of the country? A. Part of the country?

Q. Yes, any particular portion of the globe? A. I don't quite understand.

Q. Well, I will withdraw that. That general agency agreement covers the contract that the agent has with the Government concerning the boat under the jurisdiction of the agent. Is that correct? A. That is correct. The vessel is assigned to the agent and he is the agent thereon as long as the War Shipping leaves it under his agency, anywhere the vessel may be located.

Q. And when these rules and regulations were issued that there was a breakdown of discipline, the general agent was instructed to do something about it, so far as the master or the captain of the ship was concerned; is that correct? A. Yes, sir. 693

Q. All these things were done through the general agent? A. Yes, sir. They are the War Shipping's agents of the vessel.

Q. It was found, was it not, that after these contracts were issued there were things that developed that needed further attention, is that correct? A. Yes, sure.

Q. And those things that needed attention and
694 had to be taken care of, like discipline, hiring additional crew, supplying a master and members of the crew, were things that were given to the agent to carry out?

Mr. Parmer: Your Honor—
The Court: Overruled.

Q. And your answer?

By the Court:

695 Q. Do you know whether that is a fact or not? A. The regulations that were issued were given to the agents to carry out. That is correct.

By Mr. Fisch:

Q. Now, when you testified that all vessels under the jurisdiction of a general agent, the general agents are instructed— A. I don't think I used the word, "jurisdiction."

Q. You did. A. No.

Q. You did. I have got it marked here. Assuming that you did, you were referring—were you re-
696 ferring to any particular part of the United States or were you referring to some place on the continent? A. In the wording of these—

Mr. Parmer: Your Honor, I object to that. The man was not referring to anything himself. He was reading from regulations—

The Court: Sustained as to form.

Mr. Parmer: —made by others.

Q. You are the assistant to the overall operation? A. On the Atlantic Coast. 697

Q. Do you know what these regulations refer to? Do they refer to the United States? A. These regulations are all issued in Washington and apply to all agents wherever located on ships, wherever located.

Q. That is what I wanted to know.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

Q. Now, Mr. Rough, you were asked a question whether these regulations, as to the application of these regulations, and you answered they applied to ships wherever located. A. Yes, sir. 698

Q. Do you mean by that that some of these, all of these things mentioned in these regulations, can be physically performed while the vessels are at sea? A. Well, the physical application of each regulation would have to be, of course, obvious on its face. If it requires the agent to do something in port, why, the vessel would have to be there.

Q. Yes.

Mr. Fisch: That is all. 699

The Court: You may step down, sir.

(Witness excused.)

700 NICHOLAS J. POLIKNICK, residing at 34 Dartmouth Road, West Orange, New Jersey, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer:

Q. What is your business, sir? A. Stevedoring and tunnel operators.

Q. With what company? A. With the Jarka Corporation.

Q. And what position do you occupy? A. District Operating Manager.

701 Q. Did you at our request bring here your contracts?— A. Yes, sir.

Q. —for the stevedoring that was done on the Steamship Everagra? A. Yes, sir.

Q. —On January 27, 1944? A. Yes, sir.

Q. Your company did the stevedoring at that time? A. That is correct.

Q. Will you produce that contract, please?

The Court: He has it right in front of him. Show it to counsel.

Mr. Parmer: I offer this in evidence.

702 Mr. Fisch: Let me look at that first.

Mr. Parmer: Surely.

Instead of keeping that here, we have a facsimile of it here in the book, which we can offer in evidence, and we can save time.

Your Honor, we are going to offer this in evidence and we are going to get a copy of it so that we don't have to hold the man's record.

The Court: Offer it in evidence. No objection, with the right to withdraw same and substitute therefor a copy.

(Received in evidence and marked Defendant's Exhibit T.) 703

(Portions of Exhibit T were read to the jury by counsel.)

The Court: Do you wish the witness on the stand any longer?

Mr. Parmer: I wanted to ask him one more question.

By Mr. Parmer:

Q. Does the Jarka Corporation do the stevedoring at Pier 34? A. Yes, sir. 704

Q. And who has that pier? A. The Agwi Line.

Q. And you are regular stevedores for them? A. At 34, yes, sir.

Q. And do you know which agent, if any, of the United States asked you to do this work at the time on the Everagra? A. Well, I am not prepared to say that, although I do know that.

Mr. Fisch: We object.

Q. If you don't know,— A. That is correct. I don't know. 705

Q. Then I don't want you to say. A. I don't know.

Q. Very good. And your men, that is, the men employed by you to do this work, came on board the Everagra pursuant to this contract with the United States, is that correct? A. That is correct.

The Court: Any questions, Mr. Fisch?

Mr. Fisch: No.

(Witness excused.)

706

(A recess was declared, following which the trial was resumed.)

JOHN O'ROURKE, residing at 973 East 32nd Street, Brooklyn, N. Y., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

707 *Direct Examination by Mr. Parmer:*

Q. What is your business, Mr. O'Rourke? A. Steamship business.

Q. And by whom are you employed? A. Moore & McCormack Lines.

Q. What is your work for them or your position? A. Superintendent of terminals.

Q. Now, is your company an agent— A. Yes, sir.

Q. —for the United States? A. Yes, sir.

Q. That is, the War Shipping Administration? A. Yes.

708 Q. —Called a berth agent? A. GAA agents on some ships and berth sub-agents is the term on others.

Q. You have two kinds of contracts? A. Yes.

Q. One, the berth agent's contract and also a general agency contract? A. Yes, sir.

Q. Now, did your company act as berth agents with respect to the Steamship Everagra on January 27, 1944? A. Yes, sir.

Q. And what did you do in that respect? A. We made arrangements with the Agwi Lines to

berth the vessel at Agwi Pier 34 for the purpose of discharging the cargo. 709

Q. When did you make that arrangement? A. January 17, 1944.

Q. Did you do that by means of a conversation followed up by a confirmatory letter? A. Yes, sir.

Q. Have you got the confirmatory letter in your hands? A. Yes, sir.

Q. May I have it, please? A. Yes, sir.

Q. This is the copy of the letter that you sent to Agwi Lines with respect to the berthing of the vessel? A. Yes, sir. 710

Mr. Parmer: I offer it in evidence.

Mr. Fisch: No objection.

(Letter received in evidence and marked Defendant's Exhibit U.)

By Mr. Parmer:

Q. Mr. O'Rourke, did your company make the arrangements with the Jark Company for doing the stevedoring or did you instruct the Agwi Lines to do it for you? A. We instructed the Agwi Lines, inasmuch as the Jarka Corporation did all the work on that particular pier. 711

Q. Would you want to take this letter back with you and keep it in your files? We can read it into the record. A. It won't make any difference.

The Court: Let it stay here.

Mr. Parmer: That is all.

Cross Examination by Mr. Fisch:

Q. Mr. O'Rourke, I just have one question. Mr.

O'Rourke, berthing a boat simply means giving it
712 space alongside the pier, isn't that so? A. Giving —alongside and discharging on to the pier, yes, sir.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

Q. Aren't you required, pursuant to your berthing contract, to arrange for the discharge of the vessel as well? A. Oh, yes.

713 *By the Court:*

Q. Discharge the cargo? A. Discharge the cargo.

By Mr. Parmer:

Q. Discharge of the cargo? A. Yes.

Q. The vessel comes alongside the pier for the purpose of having work carried out on it, that is, discharging its cargo? A. That is right.

Q. You handle that for the United States? A. That's right.

714 The Court: All right, you may step down. Call your next witness.

(Witness excused.)

ANDREW S. VARNI, residing at 54 Copley Avenue, Teaneck, N. J., called as a witness in behalf of 715
the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Parmer:

Q. Mr. Varni, what is your work? What do you work at? A. I am a surveyor for the United States Salvage Association.

Q. And what is the U. S. Salvage Association? A. U. S. Salvage Association, marine surveyor for the underwriters.

716

Q. For hull underwriters? A. For the hull underwriters.

Q. Will you explain what that means to the jury? A. Well, whenever any damages or anything, any kind of damage occurs on ships, the U. S. Salvage is notified, who represents the marine underwriters, to appoint a surveyor to come down and ascertain the nature and extent of the damage, and agree on the cost of the repairs.

Q. Do you do that in the ordinary course in connection with all damages on vessels? A. Yes, sir.

Q. And did you in the course of that employment go on board the Steamship Everagra to examine damage to a boom which had occurred on January 27, 1944? A. Yes, sir. 717

Q. When did you go on board the ship? A. I was on board the ship on January 28, 1944.

Q. Did you examine the boom at that time? A. Yes, sir.

Q. That is, the broken parts? A. Yes, sir.

Q. What did you find? A. Found that there was a boom on the No. 3 hatch, that wooden boom that was broken right close to the heel of the boom on

the starboard side. The boom was broken off in
718 two pieces. One piece was lying down on the deck and the other piece was still in the saddle of the boom, on the king post.

Q. What did you observe with respect to the condition of the wood at the broken ends? A. The wood was in very good condition, and that is with respect to the wood, but there is also on the end of this boom, there is what we call a gooseneck or a king pin, which holds it into the king post, and that pin, which was a steel pin, was slightly bent.

Q. Are you acquainted from your experience with
719 the nature of wood which is in good condition and wood which is in bad condition? A. Yes, sir. I have been surveying damaged vessels for the U. S. Salvage for the last 18 years.

Q. Have you run across instances where wood was in bad condition and appliances had to be condemned? A. Great many cases.

Q. And are you able to tell wood which is good from wood which is bad? A. I think I am, sir.

Q. Have you got those exhibits handy? Now, Mr. Varni, you did not go down there to examine this wood in connection with the accident case of anybody here? A. No, sir. I was there to ascertain
720 the nature and extent of the damage and agree on the cost of the repairs. That is my purpose.

Q. These Exhibits K-1 and K-2, do you recognize that as the— A. That is the boom that I seen broken on the day of my survey.

Q. Will you look at the wood, particularly at the ends where it broke off, and tell us whether that wood is in good condition or bad condition, or what condition it is in? A. I would say that the wood is in very good condition.

Mr. Parmer: That is all.

The Court: Cross-examine. 721

Cross Examination by Mr. Fisch:

Q. You have been a witness before, have you not, on previous cases? A. Yes, sir.

Q. During what period of years? A. Eighteen years.

Q. That means as a witness. When I say as a witness, I mean you have testified in court proceedings before? A. Yes, sir.

Q. And you were making this survey for the U. S. Salvage Corporation, is that correct? A. Right. 722

Mr. Parmer: Association.

Mr. Fisch: Association?

Q. What connection have they with this ship? A. The—I don't know what connection they have with the ship, but we represent the underwriters for the War Shipping Administration; survey was made in behalf of the War Shipping Administration.

Q. Underwriters for what? A. That I don't know. I am sent there by the U. S. Salvage, and I do not know what their relation— 723

By the Court:

Q. Relationship to the War Shipping Administration is, is that right? A. That's right, your Honor.

Andrew S. Varni—for Defendant—Cross.

By Mr. Fisch:

724 Q. Do you know why you were on the ship, for what purpose? A. I was sent there to ascertain the nature and extent of this damaged broken boom and to agree on the cost of the repairs.

Q. The nature and the extent? A. Right.

Q. So that the damage could be made good, is that right? A. In order to place the vessel back in the same condition it was before the accident.

Q. How were you interested in seeing the nature of the wood, whether it's good or bad, if the dam-
725 age was to be repaired? A. We have to find out what the cause of the damage is, how this thing was broken, was it broken by wear and tear, or is it a damage? One of our principal functions is to ascertain whether it's wear and tear or whether it's damage. There is a big distinction in the survey to be made when it's due to wear and tear and when it's due to damage. If it is due to wear and tear, then it is our function to say so.

Q. Did you say you were not there in connection with any accident case? Did you mention that previously? A. I said I was there in connection with this accident, the boom that was broken in
726 connection with this accident.

By the Court:

Q. But you said you were not there in connection with any personal injuries. That is what the lawyer means? A. No, sir.

Mr. Fisch: That is all.

Redirect Examination by Mr. Parmer:

727

Q. Did you observe any powdery condition of the wood at the time that you examined it? A. No, sir.

Q. Did you render a report in which you made any determination as to whether this was damaged or—

Mr. Fisch: Just a minute. We object whether he rendered a report in which he said certain things.

The Court: Overruled. I will permit you to say if you rendered a report.

728

Q. Did you render a report which determined whether it was damaged, on the one hand—

Mr. Fisch: Now, he is adding something.

The Court: I will sustain the objection in that form. I will permit you to answer the question whether you rendered a report.

The Witness: Yes, sir, a report is rendered.

By Mr. Parmer:

729

Q. To whom did you render the report? A. War Shipping Administration.

Mr. Parmer: That is all.

Mr. Fisch: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Is that your case, with the exception of the medical?.

Mr. Parmer: That is my case with the exception of medical. Perhaps we can agree. I want to agree on the date of our GAA agreement. I have it here.

Mr. Fisch: Yes. Let us look at it.

Mr. Parmer: Your Honor, I think it will be—

The Court: It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the date of the GAA agreement—

Mr. Parmer: —that the date of the allocation of the Steamship Everagra to the defendants pursuant to the GAA agreement was May 26, 1943.

Mr. Fisch: The contract is dated March 1, 1943.

Mr. Parmer: Yes, but the vessel was not allocated until May.

The Court: All right. That is the stipulation then. The contract date, March 1st, vessel allocated May 26, 1943.

Mr. Parmer: With the exception of medical—

The Court: Have you considered that question of withdrawing the exhibit?

Mr. Parmer: I have determined to withdraw that exhibit, but I do not know the number of it.

Mr. Fisch: Which one was that?

Mr. Parmer: It is M. & R. regulation.

The Court: The only exhibit that you objected to, Mr. Fisch, as I recall it.

Mr. Parmer: Yes, it's Exhibit M, which

was issued on December 15, 1944, effective January 15, 1945, by reason of the fact that it was issued after the time of this accident, and its relevancy is questionable. 733

The Court: Do you know the exhibit counsel is referring to, Mr. Fisch? He spoke of the codified regulations.

Mr. Fisch: I remember there was one objection I made.

The Court: There it is. It is withdrawn.

Mr. Fisch: Fine.

The Court: The defendant rests, with the exception of his medical. 734

VINCENT RUSSO, recalled, as a witness in behalf of the plaintiff, in rebuttal, testified further as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Russo, there was testimony given in court yesterday by two witnesses who were members of the crew of the Everagra. One stated that he was a carpenter and the other an A.B. (Able Seaman). Did you see them in court? Were you here when they testified? A. I was. 735

Q. Now, they stated that they were standing right near the hatch where the work was done for twenty minutes before the accident. Did you see them there at all? A. Well, I had just come up on deck there.

Q. Answer the question. Did you see them there before the accident? A. No, sir.

736 Q. Did you see any of them after the accident? A. I did.

Q. Which one or both? A. I saw both of them after it all happened.

Q. How soon after the accident did they come? A. Oh, it was quite some time. It was after everything happened.

Q. Well, give me an idea how much time? A. Probably about three or four minutes.

Q. Did you have a conversation with them, with one, or both? A. With both of them after the acci-
737 dent.

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Now, Mr. Russo, at the time of the accident, you were coming from aft forward? A. That's right.

Q. And you did not observe or take the trouble to observe, did you, whether two men were standing over here on the port aft side of the No. 3 hatch, did you? A. Right then, I did not, because at that
738 No. 3 hatch there, there is a ladder. They come down from the ladder. They come running down after the accident.

Q. I just want an answer to this question: Did you take the trouble to observe whether there were any men standing over here (indicating) at this place I am pointing to now, on the port aft side of the No. 3 hatch? A. No, sir.

Q. Did you or did you not? A. No.

Q. All right. Now, you say that after the accident you saw two men coming, running down a ladder? A. That's right.

247.

Vincent Russo—for Plaintiff—Recalled—Rebuttal —Cross.

Q. You say now that you recognize those two men as the men who were in court the other day? A. That's right. I recognized the men, when I saw them in the hall here. 739

Q. I see. And you haven't seen them at any time since? A. No, sir, just in the hall the other day, before the trial.

Q. Now, at the time of the accident, did you see the gangway man running away from the scene of the accident? A. Did I see the gangway man running away? No, sir.

Q. What is his name? A. Forti. 740

Q. Forti? He is the man who handles the slings? A. No, sir, he does not touch anything at all. The sling men have got nothing to do with the ship. They are off the ship. They are on the dock.

Q. But the man who gives the signals as to what shall be done with the sling, that is the gangman? A. That's correct.

Q. You did not see him at all? A. The gangway man?

Q. Yes. A. He is always on the side.

Q. I asked you, did you see him? A. Sure I saw him. I saw all my men there. 741

Q. Did you see him just before the accident? A. Sure. I saw him before the accident.

Q. And he is in court now? A. That's right.

Q. During the last week, have you been in Mr. Fisch's office? A. Last week?

Q. During this present week? A. I haven't seen Mr. Fisch in a few months.

Q. Have you been in Mr. Fisch's office during this week? A. No, sir.

Q. Now, at the time of the accident, did you see either winch man? A. No, sir.

742 Q. Did you see him shortly after the accident? A. The other winch man?

Q. When I say "winch man," I mean the man who was handling the rope. A. The up-and-down?

Q. On the other drum. A. I saw him after the accident. Sure.

Q. You knew he was there at the time of the accident too, didn't you? A. Well, it was his job to be there.

Q. Yes. A. He had to be there or else there wouldn't be anybody to operate the winches.

743 Q. And that man is in court now, sitting right back there? A. He is there. That's right.

Mr. Parmer: That is all.

Mr. Fisch: That is all.

(Witness excused.)

JOSEPH R. RUSSO, recalled as a witness in behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified further as follows:

744 *Direct Examination by Mr. Fisch:*

Q. Mr. Russo, were in court yesterday when two of the crew members testified? A. Yes.

Q. Did you hear their testimony,— A. Yes.

Q. —what they stated? Now, they stated in substance or in effect that they were near the No. 3 hatch for 20 minutes before the accident, and that the spliced part of the rope got caught in the port boom, causing the starboard boom to go up. First, did you see these witnesses there at all? A. No.

They were not. I was at that spot on that side, 745
port side.

Q. Which spot were you? Will you come down and show us, please? We didn't have the model when you testified the first time.

(The witness left the witness stand and stood in front of the model.)

A. I was standing about here, looking down the hold.

Q. Wait. Turn around here. You were where? A. Standing about here, looking down the hold. 746

Q. Put your finger at the place where you were standing. A. About here (indicating).

By the Court:

Q. Where is that with relation to the port boom, Mister?

The Court: Agree on that, gentlemen.

Mr. Parmer: It is right alongside the port coaming of the hatch.

A. I was looking over the coaming like. 747

Q. Looking over the coaming near the port boom, right? Is that right, Mister?

The Court: Both of you agree on that description, Mr. Fisch and Mr. Parmer?

Mr. Parmer: It is the port coaming of the hatch.

The Court: Port coaming of the hatch near the port boom, is that right?

Mr. Parmer: That is what he says.

748 A. Yes, this is the port boom.

By the Court:

Q. How many feet were you away from the port boom? Here is the port boom. How many feet were you away? A. I don't know. I'd say there's the coaming. The niggerhead would be about here. The boom is right here.

The Court: Indicating about five feet.

749 *By Mr. Fisch*:

Q. Did you see any two men standing there? A. No, sir.

Q. Did you see them after the accident? A. Yes, I just saw the A.B.

Q. You saw the A.B.? Did you see the man who claims he was a carpenter at all after the accident? A. No, sir.

Q. Now, when did you see the A.B.? A. He came down the ladder on that ship. In order to get down to No. 3 hatch, he has to come down amid ships like on the bridge to come down the ladder.
750 He just come down that way, when I was on the starboard side. After the accident, I ran around behind the winch.

Q. How soon after it happened did the A.B. come down the ladder? A. A few minutes later, when everybody started running towards the accident.

Q. Did you talk to him? A. I had an argument with him.

Mr. Fisch: That is all.

Joseph R. Russo—for Plaintiff—Recalled —Rebuttal—Cross.

Cross Examination by Mr. Parmer: 751

Q. Have you been to Mr. Fisch's office at any time this week? A. This week? Yes, I was the other day.

Q. When? A. The other day, when I came to court, to know how to get down here, he said to meet him in his office.

Q. We began the trial on Tuesday? A. Yes. That is when I was at the office.

Q. Were you there? A. Yes.

Q. While you were there, did you see the gangway man there too? A. No, sir. 752

Q. At any time this week, while you have been in Mr. Fisch's office, did you see the gangway man there? A. No, sir. The last time I was there about a few months ago.

Q. Now, did you see the gangway man at the time this accident happened? A. Yes, I seen him about four weeks ago. We worked together on ammunition.

Q. That is not what I am asking you about. At the time the accident happened, did you see the gangway man on the deck? A. Yes, sir. He was on his job. He uses his hands. 753

Q. Whereabouts did you see him? A. He is on the starboard side, looking over the coaming to the dock to make sure nobody is in the way.

Q. In other words, you saw him right there at the time the accident happened? A. Yes, sir. He is on the job. Yes, sir. He is there.

Q. And you also saw this winchman on the port drum there too? A. Yes, sir. He had to be there.

Q. Right there when the accident happened? A. Yes, sir. He had to be there.

754 Q. Now, did you see this boom come up to the mast, as the carpenter testified in court the other day? A. The boom did not go up. I said that the draft went at a normal speed. He couldn't judge the boom.

Q. You say it did not go up? A. No, sir. The boom did not go up.

Q. Did you see those pictures with the mark at the top end of the boom? A. Yes, sir. You showed me that mark.

Q. You don't know what made that mark then, do you? A. No, sir.

755 Q. You are sure it was not made by the boom coming up and pressing against the nut? A. I wouldn't know.

Q. You wouldn't know? A. I know the boom did not jerk.

Q. Now, you haven't seen those two Latvian seamen at any time between the time the accident happened and when you saw them in court? A. That is all. I just seen them in court. He was out in the hall. I recognized him right away.

Q. You recognized them right away? A. Yes, sir, the A.B.

756 The Court: You may step down.

Mr. Fisch: I just have one more question.

Redirect Examination by Mr. Fisch:

Q. You keep talking about an A.B. Did you see the carpenter at all there at any time? A. No, sir.

Mr. Fisch: That is all.

The Court: All right, you may step down.

(Witness excused.)

DANIEL CARNEY, residing at 556 Third Avenue, Brooklyn, N. Y., called as a witness in behalf of 757
the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Carney, in general, what is your business, please? A. Stevedore foreman, cargo repairman, surveyor.

Q. In the past, have you worked for any insurance companies in any particular branch of your business? A. I worked for the Travelers Insurance Company, the Great American Indemnity 758
Company, and the Massachusetts Bonding Company.

Q. In what capacity? A. Surveyor, Inland Marine.

Q. Was there any other name you gave to it in addition to surveying? A. Well, safety engineering, they call it, surveying.

Q. Now, you talked about cargo repairmen. What kind of cargo, what material have you repaired? A. Cases, bags, barrels, and other broken cargo that comes in on the ships.

Q. Did you have occasion to repair cargo made 759
of wood? A. Yes.

Q. Your experience has extended over how many years? A. All told, on the waterfront, 47 years.

Q. And have you done the same kind of work during all that period of time? A. I would say waterfront operations, yes. Sometimes as cargo repairmen, sometimes as hatch boss; other times, why, I have taken contracts on discharging vessels.

Q. Can you tell the difference between good wood and bad wood? A. I believe I can.

Mr. Parmer: I object to this witness'
760 testimony on the qualifications shown here. He is a longshoreman, as far as I can see.

The Court: Overruled.

Q. Did you see this exhibit marked Defendant's Exhibit K-1 yesterday in court? A. I have.

Q. Did I show it to you? A. You did.

Q. Did you examine it carefully? A. I did.

Q. Which portion did you examine? A. The portions with the groove on the top.

Q. Where it is broken, is that correct? A. Broken.

761 Q. Describe the condition of that wood, please. A. The condition of that wood is—

Q. No. I am pointing to something else now. You are taking a small piece,—this big piece. A. The condition of that wood, from the appearance of it, there is some deterioration there.

Q. What do you call it? A. Dry rot.

Q. And what is dry rot? A. Dry rot is a deterioration of wood where dampness and the elements gets into it and causes it to rot.

Q. Will you come down here for a moment and show the Court and jury what portion of this
762 wood you claim is affected by the dry rot? Just turn around so we can all see, please.

(Witness left the witness chair and stood in front of the jury.)

A. All in here, it's affected.

Mr. Parmer: Pointing to the dark spots, point to this dark area. That is where you put your hand.

A. The deterioration is right through it there.

763

Mr. Fisch: All right, get back to the stand.

(Witness returned to the witness chair.)

By Mr. Fisch:

Q. Now, are there any other marks that you can discover, deterioration from the outside? A. Cracks and crevices.

Q. And when you see those things, those cracks and crevices, is there a way of testing as to whether there is deterioration? A. There is by a few: Make an inspection of it, and you take and you put what they call a tryer on it. That is like a corkscrew, a gimlet. You insert it in the cracks or the crevices and drag it out, and when the duct comes out, why, it will take and show you the difference. Then you can take and go up your boom to another crack, and take it, and if there is—take another try at it, and maybe it will show you different, and it may show you the same thing. It's according to how far the deterioration has run.

764

Q. Because the crack is something that permits the elements— A. The water and other elements to get into the crevices to deteriorate.

765

Q. Now, you told us a moment ago that you were engaged in the stevedoring business or the operation for 43 years. Have you been engaged in every branch of the stevedoring operation? A. Right from the bottom up; from the time I left high school up until the present date.

Q. And were you in business with your father

or with your uncle? A. I was in business with my
766 uncle. Then I worked for my uncle before he died.

Q. What was the name of the firm? A. J. C. Carney & Sons.

Q. Does cooperage, that is, repair of wood and cases and boxes and everything else, come under the general heading of stevedoring? A. Well, we done that. We also done,—the J. C. Carney & Sons was coopers and stevedors.

Q. For how many years did you work for these insurance companies as safety engineer? A. On
767 and off for the three companies about 15, 16 years.

Q. Now, as the hatch—did you say you were a hatch foreman or hatch boss?

The Court: He said he was a cargo repair man and stevedore foreman.

The Witness: That is a hatch boss, your Honor.

Q. And the hatch boss, what duty has a hatch boss? A. The hatch boss looks after the discharging and loading of the cargo into the ship, supervises it, and also rigs the hatch up to take the cargo out or put it in.

768 Q. [illegible] you had experience in that kind of work constantly for 43 years? A. On and off, yes, constantly, for 47 years.

Q. What vessel have you been on last as a hatch boss? A. About three months ago, I worked on the Booth Line steamer, Pier 33.

Q. What capacity did you occupy there? A. Hatch boss.

Q. You know then as hatch boss how the work is done? A. Yes, sir.

Q. Are you acquainted with the setup as it's shown in this model, Exhibit E? Are you acquainted with the setup of the booms, and so forth? A. Yes. 769

Q. Will you come down, please? A. (Witness left the witness chair and approached the model.)

Q. Assuming that nine bags of cocoa beans, weighing about 1,000 pounds, were first taken up from the hold by the up-and-down fall here, which is on the port side; and then the man operating the niggerhead on the port side, slacked off. After he slacked off, the man operating the niggerhead on the starboard and also operating the Burton boom took hold in the sense that he was taking the cargo in the manner in which I have shown you. There has been testimony that while this was taking place, the spliced part of the rope got caught in the block on top of the port boom. Is that possible? A. Impossible. 770

Q. Tell the Court and jury why it is impossible? A. When you take the draft up out of the hold, she comes up on what you call your cargo fall, or, in other words, longshoremen term, it's as picking it up.

Q. A rope or a cable? A. It's a fall or a cable rope, or cable, whatever your fall is made of. If it is a rope fall, why it is a rope, and if it is a cable, why it is a wire cable fall; but when he hoists it up, he takes it up a certain part and lifts it up so many feet from the floor of the hatch or from the top of the other cargo box or then the gangway man signals for the man on the Burton. 771

Q. That is this here (indicating)? A. The the Burton here. And by the way, this is rigged, shows a drum end rig. He takes—he takes a few turns around on the drum end. The drum end, he

switches on the left hand, and then when she gets
772 to a certain height over the coaming of the hatch, about two feet over the coaming of the hatch, the Burton man drags, and he drags it about that level (indicating) to clear the rail of the ship to make a landing of the draft on the dock, which would be in this manner (demonstrating). And she hangs right above the coamings or the rail of the vessel to clear the rail of the vessel. Then the man on the—the man on the port side port, drum end, which is the pick boom, or the picking fall, he slackens up, and the other man takes one or
773 two more turns, and she swings over the side, which just about, within about two foot, maybe less, maybe more, just to clear the rail. Then he slacks away on the drum end and lowers it down unto the dock to the stool or on the bench, as we call it, the landing bench; which other people takes it, picks it up, and takes it with a tractor and takes it away on the dock to parts of the dock, wherever it is possible.

That is the way the discharging operation of a bag cargo is done. At that time, the splice, the splicing, the fall, would be where the hook is spliced on to the ring.

774 Q. Show that to the Court and jury, please, where the splice would be. A. The splice would be down here, where it's on to the coupling ring, the couplings, both, to the falls; and there is a splice on one fall and a splice on the other, a short splice which we call as an eye splice. When that eye splice goes in, it's right down on the hook, and that never reaches the top of the boom at any time, because the draft clears the side, and naturally, a man working on the drum end is not going to talk, and he is watching his draft all the

time, because he must take his turns on or take his turns off or put turns on, whichever way he needs; and in case anything goes wrong, all he has got to do is let go in his hands easy, and let her sag, what they call sagging. The drum will keep going around, but the draft won't hoist. So, therefore— 775

Q. Why won't the draft hoist? A. Because the rope fall is sagging on the drum end.

Q. You mean the coils here are loose on the niggerhead, is that correct? A. They are loose on it, until he pulls tight. When he pulls tight—

Q. They don't take when they are loose? A. Then she will take ahold and she will hoist. The drum end man is watching, the gangway man is watching his draft, and the drum end man is watching the draft at all times when they are working on the drum end. 776

Mr. Fisch: That is all.

Cross Examination by Mr. Parmer:

Q. Mr. Carney, your explanation, correct me if I am wrong, of why this splice cannot, that is, impossible for that splice to go through that block, is that the man running this niggerhead here on the port side is watching it all the time? A. Watching it all the time. 777

Q. Yes, but if he is not watching it all the time, what will happen? A. The gangway man is watching.

Q. Suppose he is not watching it, suppose the longshoremen don't do the right thing, then can the splice go through the block? A. No, because the man on the Burton, he is taking his turns on, and he has got his turns on there, and he holds it

off, and he holds it just a certain space, and he
778 pulls it away from the drum, the port boom over to the center of this starboard boom, see, so, to fetch it over the rail, where he takes the turn on there, similar—he pulls in that way (demonstrating).

Q. You are assuming that all of these longshoremen or one of them at least is going to step in there and sort of prevent this thing from being done? A. That is a way, that is the only way you can make an operation on it. This here man, he must have—he has got his turn on this drum end.

779 Q. You are assuming, Mr. Carney, that in the normal operation, this splice here is not going to go through the block. That is right, isn't it, in the normal operation? A. It don't go as high as the block, in any operation, it won't, because the Burton falls prevent it.

Q. Wait just a minute. In the normal operation, no longshoreman is going to run his winch or his drum in such a manner as to pull this draft up so that the splice goes through the block. That is to say, we are all agreed on that. A. In any operation, he doesn't fetch it up—he doesn't fetch it—he don't fetch it up to the hatch coaming, be-
780 cause the Burton takes ahold.

Q. Now assume, Mr. Carney, that before a Burton takes ahold, assume that now, the up-and-down man goes ahead with his winch and does not stop, won't the splice then go up and enter the block? A. No, because your Burton man, when he gets up, after he takes it up off the top of the other bag and clears the top of the other bag by a few feet, the gangway man signals for the Burton man to go ahead, and then he takes the strain right on it, which is an assist to the hoist.

Q. Now, Mr. Carney, let's go through it just as I asked you to assume it. Now, here is your Burton man. The Burton man does not do anything. All right, now, assume it. He is not going to do a thing. Here comes the up-and-down man. He pulls, he does not stop pulling, and he keeps on pulling. Still, the Burton man does not do anything. He keeps on pulling. And, finally, the splice goes into the block. Did you see me do that by the operation of these falls just before or as I was now? Did you see it? A. I never seen it. 781

Q. Did you see what I just did? A. I just see what you just did, but— 782

Mr. Fisch: Let him answer, Mr. Parmer. Let him answer.

A. I just see what you just did, but I can't see where the man takes it up to that height. He doesn't need it at that height. He don't have to fetch it up for the boom man to take her to drive her across.

Q. In other words, if he takes it up to that height, that is, angle— A. What?

Q. In other words, if he takes it up that height, this angle— A. He can't take it up, because the Burton man won't let him. The Burton man has got ahold on it. 783

Q. If the Burton man doesn't have the hold on it and he is not paying attention, then it goes up, isn't that right? A. The Burton man must have a hold on it because both of his falls is coupled. What has he got his falls coupled for?

Q. Are you assuming, Mr. Carney, that longshoremen are careful at all times, in giving your

answers to these questions? A. A longshoreman is
784 careful at all times?

Q. Yes. A. That is the way the ship is rigged for that.

Q. Are you assuming that longshoremen are careful at all times or haven't you seen longshoremen guilty of careless acts and negligence, in your experience?

Mr. Fisch: Your Honor, we are going far afield: "Haven't you seen longshoremen in your experience being negligent?"

The Court: Sustained.

785

Q. Are you assuming, for the purposes of your answer to this question, that the longshoremen do not make mistakes, not negligent? Answer that yes or no, if you will.

Mr. Fisch: Same objection, your Honor.

The Court: Overruled.

A. No.

The Court: The answer is no.

786 A. No.

Q. Now, if you assume, Mr. Carney, that these longshoremen are not doing what they ought to be doing, that they are making—they are doing the wrong thing, assume that now,—assume that they are doing it wrong, not the right thing but the wrong thing, can't they then produce this result, where the splice— A. Where the splice goes in the block?

Q. Suppose they do not do it right? A. The Burton prevents it. You have got two falls cou-

pled together. Your Burton falls prevents it, because he must have a hold of it, because he must assist on the lift. 787

Q. You see, Mr. Carney, I am asking you to assume that he is not doing that. A. How did the cargo come up out of the hold?

Q. Well, now. All right. I am asking you to demonstrate that to the jury now yourself. Listen, now. Listen to the question. The Burton man does not bring the cargo up out of the hold, does he? A. He does. He assists.

Q. Now, Mr. Carney,— A. Where the falls is coupled, he assists in fetching it up. That is the reason you coupled the falls. 788

Q. Mr. Carney, when the draft is raised from the hold, do you say that the Burton fall has any of the weight of the cargo on it? A. It does, when it gets up.

Q. I said, when it's being raised up. A. He does. He assists on the lift. That is the reason your falls is coupled.

Q. Now Mr. Carney, do you see that on an up-and-down, the pull is in a straight up-and-down direction? A. Not always. It's a drag some time.

Q. As we have it here, it's an up-and-down direction? A. Yes. 789

Q. If you pull with the Burton while it's coming up, you only succeed in bringing the cargo over into a different position of the hatch, do you not, and thus put an additional strain on the up-and-down? Isn't that true? A. No. I will explain it. The way that you have got this rigged here, you have got—both falls is coupled up, which shows it here. There's—your falls are coupled, both your falls is coupled up. This brass object, I believe it must rip your draft. Your Burton man, the

man that makes up them drafts, is on the other
790 side of the square of the hatch, underneath, the other side of the coamings. When he makes that draft, the Burton man must have ahold, because he must take and make that drag to drag it out.

Q. Yes. A. To drag it out, and then the up-and-down man goes and the upper man picks it right up. The up-and-down fall picks it up, in this fashion. The other man is helping with it. He is assisting, until he gets till about two foot, maybe a little more than two foot, over the square of the hatch, over the coaming.

791 Q. Let's go back and analyze just what you said, Mr. Carney. You started with the assumption that the cargo is in the wings of the ship. Right? A. Yes, it's piled all over the square of the hatch.

Q. All right. We will go right along with you. And at that point you say the Burton has to be used in order to drag the cargo in a lateral direction out into the square of the hatch? A. Out to the center so as to give him a straight pick-up.

Q. Yes. In other words, the Burton is used to move the cargo in a lateral direction, isn't that right? A. Pull it up, right, down in the hatch.

Q. Maybe you don't understand me. When I
792 say pull it in a lateral direction, I don't mean it will pull up and down. I mean pull it in a lateral direction, from side to side. A. Bring it from the wings to the center.

Q. Yes. And that is the pull from a side to side direction, isn't it? A. Pulling from the wings, yes.

Q. I said from side to side. Is there anything objectionable about that? A. No. It's the same answer.

Q. And then after it gets into the square of the

hatch, then it has to be raised and the up-and-down raises it? Right? A. The up-and-down and Burton, both. 793

Q. Let's examine that. If the up-and-down is raising it and you exert power on the draft by means of the Burton, do you do anything more than pull the draft away from its position under the toe of the up-and-down boom? A. You take and you assist with the lift. You assist with the hoist out of the hull with a couple fall.

Q. In other words, the Burton can be used? A. The Burton is used to assist in the hoist.

Q. The Burton can be used to bring the load over to a position of the toe of the boom and then the two falls pulling together can assist in the hoist? Correct? A. The Burton, the up-and-down and the Burton, goes ahead and picks it up, see, takes the strain on the draft, such as I get it here now (demonstrating). 794

Q. Yes? A. The Burton comes along and he just pulls it out, if it is in the wings, right side or left side, whichever you want to drag it. He pulls it out. It's then within about a foot, two foot over the top of the other cargo bag, piled in the hold.

Q. Yes? A. The Burton man has always got ahold. The gangway man gives a signal for him to go ahead. The both falls goes ahead, until they hit the coamings of the hatch or a few feet above the coaming, see, a few feet. Then the Burton man will take and pull it over to the Burton boom, so as to land it on the dock. 795

Q. Mr. Carney, do you know the question I asked you? A. Yes.

Q. What question did I ask you? A. You asked me, did both falls take a hoist. I said yes.

Q. That is what I have been waiting for. Thank
796 you. Both falls— A. —assist in the hoist.

Q. Both falls can assist in the hoist? A. They assist in the hoist.

Q. You don't know, do you, just what these longshoremen were doing on the day of the accident? A. I don't know nothing.

Q. You don't know whether they were working in the way that you just described here, where the up-and-down and the Burton were both assisting in the hoist, do you? You don't know that? A. Why did they couple their falls, if they didn't
797 make for an assist?

Q. Mr. Carney, it is perfectly possible, is it not, to unload the cargo this way—just possible, maybe you haven't seen it. I just asked you whether it is possible for the load to be raised entirely by the up-and-down, and after the up-and-down has raised the cargo over the square of the hatch, for then to have the Burton take hold in order to bring it across the deck? That is possible, isn't it? A. No, because if it was possible, you wouldn't couple your falls. You work it with a single whip. You wouldn't need it coupled.

Q. Isn't the purpose of coupling, Mr. Carney,
798 simply so that you don't have to put the Burton fall on the up-and-down each time the up-and-down comes up? You have done it already. Isn't that the purpose of coupling it? A. The purpose of the coupling is for both falls to take the strain and take the weight of the lift.

Q. Now, isn't it possible to do it in the way that I described,—maybe you don't approve of it—but isn't it possible to just have the coupling there so that you don't have to couple the two up each time you bring up some cargo; and then—

Mr. Fisch: Just a minute, Mr. Parmer. Are we speaking about an operation where the rope, where the slings are coupled, or are you speaking where there is no coupling? 799

Mr. Parmer: I am speaking about a situation where two falls are coupled.

Mr. Fisch: Where they are coupled?

Mr. Parmer: Yes.

Mr. Fisch: I have no objection—we object to that because that question assumes that you do not have to couple the fall here, and we are only talking about a fall that is coupled.

800

Mr. Parmer: I think you misunderstood the question, Mr. Fisch.

The Court: Overruled.

By Mr. Parmer:

Q. Do you understand it? A. I understand the question. The question is, if it is possible for to take and fetch it up on the cargo fall.

Q. On the cargo fall, merely have this couple, so that each time you bring it up, you do not have to put the Burton on; it's there already for convenience? A. No.

801

Q. You don't think that that is even possible? A. It is not possible, because you wouldn't couple your falls, use both falls for to take and give the draft—to take the weight of the draft on both falls where you are raising two falls. If such was the case, you wouldn't have a Burton fall. All you can do is take and have a man on the guy and sling your boom any way you want.

Q. You are really telling us you think it is inadvisable to do it that way? A. Not at all inadvisable. I am saying that the reason the fall is

coupled and that the both falls is coupled together,
802 is one fall must assist the other in making the hoist.

Q. In other words, that is what you would do? A. That is what any hatch boss would do. You must get the cargo out.

Q. You have never seen it done this other way? A. Not with a coupled fall; no.

Q. Now, would you resume your place on the stand, Mr. Carney?

(The witness sat down in the witness
803 chair.)

Q. Mr. Carney, has your experience with wood been with the wood used in repairing cargo in coopering, and so forth? A. No. I have made surveys of conditions on a sidings, planking, deck, and other equipment on board inland marine vessels, lighters, decks, and the like of that, some lighters.

Q. Then you have had some experience with wood where there was dry rot? A. I have, yes, lots of it.

Q. You are relying on that experience now in
804 saying that there is dry rot in these exhibits which have been shown to you? Is that correct? A. Your piece there.

Q. Could you answer that question: You are relying on your experience? A. On my practical experience, yes, on what I have seen, yes.

Q. And this wood here is, this Exhibit K-1 and K-2, is similar to cases within your experience which, in your opinion, have been dry rotted? A. Where I found dry rot, yes.

Q. Now, take this exhibit, K-2? A. Right,

Q. Do you see any dry rot on the end of that? A. It has been well shook off. She is still porous. 805

Q. Mr. Carney, the question was, do you see any dry rot on the end of this Exhibit K-2? A. Traces of dry rot, yes.

Q. You see some traces? A. Traces of dry rot.

Q. Will you point out just one of them? A. Right in here, right in here, she's porous, but you can see the porous there.

Q. You can see pores in wood? Is that what you have been assuming? A. She is a little porous, more porous than what you will find than on the clean side. 806

Q. Do you mean that these cells of the wood, the cellular construction of the wood, is a porous condition indicating dry rot? A. That takes in and shows whether there has been rot there, yes.

Q. I want you to mark it so that we won't have any mistake about what you mean. Have you got your glasses? A. Yes, sir.

Q. Can you see the holes without the glasses? Can you? A. Sometimes.

Q. Did you see them that minute when you were pointing them out to me without your glasses? A. I have seen them yesterday when I had the glasses on. 807

Q. When I asked you to point out the place on this exhibit where the dry rot was, you didn't have your glasses on. Could you see it at that time when you were pointing it out to me? A. See the porous part?

Q. Answer that question, please. A. Partly, yes.

Q. Could you see it with those eyes of yours and without your glasses? A. Partly. I can see it better with the glasses.

Q. Now, you have got your glasses on. Will
808 you now look at it again and point out the place where you see the dry rot or the evidences thereof? A. All through—all through right in here, right in here (pointing) shows porous.

Q. I just want one place where you see a pore, which you say shows just one pore. Can you point out one pore? A. I will mark it for you. Want it marked?

Q. I would like to have it marked. A. (Witness marks.)

Q. That is one. One is enough. Can you see
809 those pores? A. I can see those pores.

Mr. Parmer (addressing the jury): The witness points to this here, this part here, and this part here, as showing pores, showing dry rot.

Q. Now, is the dry rot that you see on this Exhibit K-2 and which you have just marked similar in character to the dry rot you see on this other exhibit marked K-1? A. Which is K-1?

Q. This is it? This is K-2 and K-1. I ask you if it is similar in character to it? A. Similar in
810 character and the discoloration is the same.

Mr. Fisch: Watch it. It is going to roll off (referring to the exhibit).

Q. Do you see any discoloration on this K-2 at the place where you made the mark? A. Yes. This is the discoloration.

Q. I mean a discoloration in addition to the discoloration of the pencil mark which you just put on it. A. Discoloration, she has a discoloration all over.

Q. Never mind "all over." A. Yes.

Q. I want to know this particular space. Do 811
you see any discoloration of the place that you put the pencil mark? A. Yes.

Q. In addition to the pencil mark? A. Yes.

Q. What color do you see there beyond the color of fresh wood? A. Of fresh wood, there is no color of fresh wood.

Q. It is not? A. No.

Q. When you have a condition of dry rot, how does that affect the wood? A. It's a decay.

Q. Yes? And how does that affect the wood with respect to its tensile strength? A. Deterioration 812
tion cuts it down, cuts down the tensile strength.

Q. In other words, it becomes soft, doesn't it? A. In other words, it becomes—in other words, it is not able to take the strain and the original piece.

Q. Do you know what "soft" means? A. Yes.

Q. Well, will you tell me whether the wood becomes soft when it becomes dry rot? A. Certainly. It becomes soft, much softer than the other part that has not got the dry rot.

Q. And it becomes easy to cut, doesn't it? A. Well, yes.

Q. So wood that has dry rot in it cuts very easily, doesn't it? A. It's according to how much 813
dry rot and how long the dry rot is in there,—

Q. Yes? A.—the length of time the dry rot—

Q. So that if the wood has a considerable amount of dry rot, it is very easy to cut the wood, correct? A. It's according to how long the dry rot has been there and how long the wood has been in decay.

Q. If the wood is very hard to cut, that means that there is hardly any dry rot in it. Isn't that right? A. When it's hard to cut?

Q. Yes. A. Well, as I testified, as I said before,
814 it's according to how long the dry rot has taken in—how long the deterioration has started.

Q. Now, if you were to cut or try to cut some of the wood of this exhibit before you and you found it very, very hard to cut, what conclusion would you reach with respect to the amount of dry rot that there was there, if any? A. The amount of dry rot?

Q. Yes. A. Taking it from the stick itself?

Q. What is that? A. Taking it from the stick itself, which is classified as a hard wood,—

815 Q. Yes? A. —white pine.

Q. Yes? A. There are other people that would term it as Northern pine. You will find it that she is much harder, where there is no deterioration on the cut than what you are where deterioration is.

Q. Suppose that we let you cut some of this at the place where you say the deterioration is, and, on cutting it, you find it to be very, very hard, very difficult to cut, what is your opinion then with respect to that—

By the Court:

816

Q. Would that change or alter your opinion? A. No, it wouldn't alter my opinion as for the deterioration at all.

By Mr. Parmer:

Q. Tell me, Mr. Carney, is there any dry rot on this end where they cut it with the saw? A. No. The only thing, it takes and shows on this where they ripped it, that they left an abrasion from the saw on account of the way it was cut. They didn't

cut it smooth, where a power saw would cut it much smoother. This is very, very hard wood. This is what they call white pine. 817

Q. And you are suggesting, are you, or saying, testifying, that at the present time the wood is hard and sound at the end where they sawed it? A. It shows it—

Q. —And not so hard and less sound at the end where it broke? A. That is right.

Q. You are saying that, are you? A. Yes, sir.

Q. Then there ought to be a difference in the speed with which you can cut it, isn't that so? A. Well, you can cut off parts of deterioration of lumber where the deterioration is a longer stage than what you can where hasn't quite the same length of time. 818

Q. You can cut it faster? A. And the longer the deterioration, the heavier the rot, yes.

Q. Have you got a knife with you? A. No, I have not. I haven't even got a tryer.

Q. That is, you haven't even got a tryer? A. I didn't carry it with me.

Q. Now, Mr. Carney, I want you to take any place that you please, you suit yourself, and show us, by trying to cut this wood, that it's soft because of deterioration, produced by dry rot. I want you to show by the speed with which you can cut it with a knife, please. A. According to how sharp the knife is. 819

Q. If you don't think the knife is sharp, we will get one sharp enough to suit you. A. Right here (demonstrating). There you are. Now, take this side here. Here is where I cut it.

Q. You say that is dry rot? A. I say there is deterioration of rot there, yes.

Q. Now, wait a minute. Now we are going to

take out some slivers and examine them; also let
820 us take some from the other side.

The Court: Let the record show what the witness did. The witness cut some ends from the rough side of the exhibit, cutting horizontally.

Mr. Parmer: Yes, cutting horizontally.

The Court: Counsel for the defendant has just cut two slivers from the rough end, cutting into the exhibit, in the opposite direction from which the witness cut.

821 The Witness: That is cutting into the grain.

The Court: Cutting into the grain.

By Mr. Parmer:

Q. See if you can cut some of this wood out. A. You are never going to cut it that way, Mister.

Q. No? You don't think I am going to? Well, you will see. Did you notice that wood come up quickly from the good end? A. Yes, sir.

Q. Now, let us cut some more of this. A. All right, sir.

822 Q. There isn't any difficulty when you get started on this thing? A. No difficulty whatsoever, because you are cutting with the grain. You are not cutting—that is not a cut. There is a piece of the grain. You can see it lifts right up.

Q. All right. Once we get the sliver out, we will cut it across the way that you like it. Have you got some of the wood from the other end, that you are saving? A. Yes. You have got a couple of slivers here.

Q. All right. A. You didn't cut it. You slivered it.

Q. Let us see the difference in the cutting of the wood. Those are three pieces. A. Three slivers on the grain, yes. 823

Q. On the end where it broke, right? A. Yes.

Q. Here is a sliver from the other side where it is cut. A. Yes.

Q. Will you cut it? Just put it down there and instead of taking it up in your hand, cut it, if you will. A. To cut it, I must hold it.

Q. Put your fingers on it. That's all. Are you putting pressure on that? A. Not so much.

Q. You haven't cut it yet, have you? A. No.

Q. That is a sliver from the end that broke? A. That's right. 824

Q. And that is the wood that is affected by dry rot? A. Yes. Now, take the piece, the sliver here (indicating).

Q. That is the sliver from the o side. You see the paint on it? A. I see it. Yes.

Q. All right. Try that. You have put all your strength on that. Have you been able to cut it yet? A. Just made a gash in it, that's all.

The Court: You had better indicate for the record just what has been done there, Mr. Parmer.

Mr. Parmer: Very good. 825

A. Will your Honor—

Q. Just wait, just a minute.

Mr. Parmer: Here is a piece from the end of the wood which the witness says is defective. He has put his strength, with the knife on it, and the nick of the knife is there, but it is not cut through.

The Court: That is from the defective
826 end?

Mr. Parmer: That is from the defective end.

The Court: That is the ragged end?

Mr. Parmer: The ragged end. Here is likewise a piece from the sawed end which the witness says is in good condition. He has put his strength on that, and here is the nick in that, which hasn't gone through.

The Court: You had better put both those slivers in that envelope, have the Re-
827 porter mark them as a separate exhibit; first, the one from the jagged end and second the one from the butt end or the sawed off end.

The Witness: That is a sliver with the grain.

By Mr. Parmer:

Q. Sliver with the grain? Can you take a sliver against the grain? A. No, you cannot.

Q. It cannot be done? The only way you can get a piece of wood out of that for testing is to
828 take a sliver, is that right? A. Take a sliver.

The Court: Have you got those two pieces?

Mr. Parmer: I have them, but I haven't them identified. Here is the jagged end.

(Jagged end received in evidence and marked Defendant's Exhibit V-1.)

Mr. Parmer: And here is the sawed end.

(Sawed end received in evidence and marked Defendant's Exhibit V-2.) 829

Mr. Parmer: I am finished with the witness.

Mr. Fisch: I am finished with the witness, your Honor.

The Court: All right, you may step down.

(Witness excused.)

The Court: We will recess now, ladies and gentlemen of the jury, as far as you are concerned, until 2:30 P. M. Do not discuss the case among yourselves nor permit anybody to discuss it with you, and do not visit the scene of the accident. Be in your seats at 2:30. 830

(Whereupon a luncheon recess was taken until 2:30 P. M.)

AFTERNOON SESSION

831

(Testimony of Dr. George H. Hyslop omitted.)

832

CHARLES W. STEUERWALD, residing at 604 Boulevard East, West New York, N. J., called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Fisch:

Q. Mr. Steuerwald, what work do you do? A. Marine carpenter.

Q. Before you came into court yesterday, had you ever met me? A. No, sir.

833 Q. Did you ever meet Mr. Schiffman in my office? A. No, sir.

Q. Have you ever been a witness in any case at all? A. No, sir.

Q. For how many years have you been marine carpenter? A. Fifteen years.

Q. When you say marine carpenter, what work do you do? A. Carpenter work on ships.

Q. And does that carpenter work involve the wood on every part of the ship? A. Every part of the ship.

Q. And that work you have been doing for fifteen years? A. Fifteen years.

834 Q. Can you tell whether wood is good or bad, by looking at it? A. Yes, sir.

Q. Did I show you this Exhibit K-1 yesterday, Mr. Steuerwald? A. Yes, sir, you did.

Q. Now, I direct your attention to the rough part of this K-1 and ask you to tell us whether the wood is good or bad. A. Do you mind letting me see it a little closer? Dry rot. Pick it off with your fingers (demonstrating).

Q. Now, a few envelopes—

835 The Court: Are you all through with the exhibit now, Mr. Fisch? All right, we will have it taken down.

Q. What produces dry rot, Mr. Steuerwald? A. From the looks, I observed on that boom there is quite a big fissure in it, which would allow water to run in there, and over a course of years, it would form a dry rot.

Q. And the fissure extends to the outside of the boom, does it not? A. Yes, sir.

836 Q. As a matter of fact it begins on the outside and goes inward? A. That's right.

Q. Now, there are some samples picked out by Mr. Augenti, a witness for the defendant, and it is marked. That is what that is, marked—

The Court: That's right, Augenti, Mr. Fisch, Augenti are the oblong envelopes.

Mr. Parmer: Here they are, over here.

Mr. Fisch: Your Honor has got a better memory than I have. I can see that.

What are those?

837 The Court: Those are chips which were taken off this morning while your expert, Mr. Carney, was on the stand.

Mr. Parmer: This was at the time of the sawing.

The Court: That is at the time of the sawing, at the time when Mr. Parmer was cross-examining the captain.

Mr. Fisch: Yes, your Honor. I picked up the pieces and put them in an envelope.

Charles W. Steuerwald—for Plaintiff—Rebuttal —Direct.

838 *By Mr. Fisch:*

Q. Look at these pieces, Defendant's Exhibit K-3. A. This is virgin pine. If that was a solid piece of wood, you couldn't break it off with your finger that way. You can bring that bit up. I [illegible] it and show you. It will be impossible to sp[illegible] wood with your finger unless—like that (indicating). Here is one here, a piece, just the slightest little pressure. I saw you using a knife before on it, but this here, you can break, you can crumble up, powder with your finger. That is
839 what you call dry rot. It is not with only one finger. You can do it with practically all of them, —no pressure at all. You can also see that it is dry rot.

The Court: Let the record show the witness broke some small pieces from the exhibit with his fingers.

By Mr. Fisch:

Q. Mr. Steuerwald, looking at the appearance of the big piece, can you state for how long a period
840 that dry rot has existed, approximately? A. Well, I couldn't just say.

Q. Approximately for how long a time? A. Well, five, ten years, sometimes.

By the Court:

Q. Not "sometimes" but looking at the exhibit, can you tell us with reasonable certainty in your opinion how long the dry rot can you say was there existed prior to January 1944?

841

By Mr. Fisch:

Q. —Before the accident. A. I'd say between five and ten years.

By the Court:

Q. Is that a guess? A. No, sir. It could happen within them periods. All depends on how it was weathered.

842

Mr. Fisch: That is all.

The Court: You had better return now, Mr. Fisch, the exhibits to the envelope.

Mr. Parmer: Would your Honor allow him to remain there just a minute?

The Court: Certainly.

Cross Examination by Mr. Parmer:

Q. How did you happen to get called into this case? A. I came from the union.

Q. What union is that? A. Marine Carpenters' Union. Mr. Young, our delegate, met me yesterday and asked me could I come down to a case and testify.

843

Q. I see. A. I said, "I don't know anything about any testimony. I have never been in court in my life." "Well," he said, "now, the lawyer by the name of Mr. Fisch wants somebody to come down to the court." So I came down.

Q. And you came here and you looked over these exhibits? A. Yesterday, yes, sir.

Q. And you formed your opinion at that time? A. I did, sir.

844 Q. And you were ready to come up here and demonstrate your knowledge of it to the jury as a result? A. Not to the jury. I am not trying—I am only testifying as to my belief.

Q. Now, you find all of these pieces similarly easy to break or do you find it only possible to break the little ones? A. Of course, naturally, the thicker the wood gets, the harder it's going to be to break. There is a certain amount of strength in the wood, but if any wood was in good condition, you couldn't powder it up into a powder.

845 Q. I see. A. Now, that shows you there is dry rot. Remember, this is only part of the butt. There is about 18 inches more, maybe three feet more, that lays in where the saddle is, that would be thoroughly rotted, which ain't in court.

Q. Instead of arguing— A. I am not going to argue.

Q. All right. Would you mind just answering the questions, sir— A. Yes, sir.

Q. Just that. A. Yes, sir.

Q. If I gave you a match,— A. Yes.

Q. —you'd have no difficulty in breaking it? A. Positively not.

846 Q. Well, that wouldn't indicate to your mind that the match had dry rot, would it? A. But if you gave me a piece of the butt, the same size, I couldn't break it.

Mr. Parmer: May—

Mr. Fisch: Could we have the answer?

Q. Would you answer the question? A. Yes, sir.

Q. That wouldn't indicate to your mind that the match had dry rot in it, would it? A. No, sir.

847 Q. But yet if that match were—that is, if the wood of the match were much bigger, in the form of a match, it might be very difficult for you to break it with your fingers. A. Naturally. Naturally.

Q. So you could take even good wood and if you get it down into such a small piece, you could break it with your fingers, dry rot or no dry rot? A. That's right.

Q. What you have done here in demonstrating what you can do with your fingers before this jury is to pick out the little pieces and break them? 848 A. Naturally, I couldn't break that with my finger.

Q. Just "Yes." Just before you picked out one of the little pieces, you had one of the bigger pieces in your hand and you put it down and transferred your attention to the little one? A. That's right.

Q. Because you knew you couldn't break it? A. Now, wait a minute. I can powder that piece up, and that is pretty big.

Q. Do you see what you are doing? A. Sure. I am taking the rot off of it.

Q. Do you recall where this piece came from? 849 A. No, I wouldn't know. How would I know where it came from?

Q. You were not here when it was cut from the piece, were you? A. No, sir.

Q. Are you acquainted with booms? A. Yes, sir.

Q. Are you acquainted with iron straps— A. Yes, sir.

Q. — near the goosenecks? A. Where the boom is, that's right.

850 Q. Yes? A. Yes, sir.

Q. You are acquainted with the fact, aren't you, that iron rusts? A. That's right. There is iron rust.

Q. If exposed to the weather, so it rusts? A. That's right.

Q. And you are acquainted with the fact that, in connection with all booms, when the iron that forms the gooseneck rusts for a certain portion of the wood, the iron rust, associates itself with the wood? A. What has that got to do—I am not an
851 expert on iron. I am not an iron man. I am a wood man.

The Court: Answer the question, Mr. Steuerwald. If you cannot, you are entitled to say, "I can't answer it."

The Witness: I don't quite get his question.

The Court: We will have it read to you.

(The following question was read by the court stenographer:

"Q. And you are acquainted with the fact that, in connection with all booms,
852 when the iron that forms the gooseneck rusts for a certain portion of the wood, the iron rust, associates itself with the wood?")

Q. —which is next to it? A. Naturally. We will put this in the back (referring to pieces of wood).

Mr. Fisch: Wait a minute. We will take that away. I want to put it in the bag.

853 Q. Do you realize that those—don't you realize that the pieces which you just saw came as a result of cutting away at the place where the iron strap ended, the point of the iron strap ended? Did you know that? A. That was the point where the end of the strap was?

Q. Do you see it right here? A I see a black mark on there.

Q. Do you see the angle I am pointing to? A. I see a discoloration there, yes, but I wouldn't know whether it would be the angle, whether it would be there or not.

854 Q. Look on the other side. A. This is where the crack is that I was talking about. You mean to tell me that the angle was in there?

Q. Well, I do mean to tell you that, but does it disappoint you to find it out?

By the Court:

Q. Can you answer the question? A. Yes. I will look at it and tell.

Q. He wants to know, does that disappoint you— A. What is that?

Q. —to find that that was the angle there? A. 855 Oh, no. No, no.

Q. That does not disappoint you? A. Does not disappoint me at all.

The Court: Now, is there another question, Mr. Parmer?

A. That is a possibility that could have been the end of the angle.

856 *By Mr. Parmer:*

Q. And on the other side, it is the end of the angle too? A. Naturally.

Q. This wood that you have been dealing with and holding in your hand and testing is the wood which has become associated with the rust from the iron. You know that now, don't you? A. Yes, same thing. Yes.

Q. It's the wood that has become associated with the rust? A. I can pick out—off any pieces. You are right. That is the same. Practically the
857 same place.

Q. It's only at that point where the wood has become impregnated with the rust from the iron that you are criticizing? A. I am not criticizing that because of rust. I am criticizing this because it is rotted, not because of rust.

Q. All right. Now, let us understand each other. It is only— A. Pardon me just for one moment. I will turn this around (referring to exhibit) and I can't pick that off with my nail.

Q. No? A. Not one piece, because that is solid. That is not rot here. That is not rot.

858 The Court: Indicating the sawed off end.

A. But this end, it was rotted.

Q. It is not only solid, but it's big and smooth? A. Well, naturally, that is smooth. That is cut with a fine saw.

Q. Now, the part that you say is rotted is solely this part that is underneath the place where the end of the iron band was. Isn't that so? A. I say it's rotted all through, all over.

859 Q. So you say that there are parts in addition to the parts where the iron band was that were rotten.

Q. I want you to show me one such part away from that. A. That is rotted?

Q. One such part, not the same. A. All right.

The Court: You may stand up.

A. This is where the iron was?

Q. Yes. That's where the iron was. A. Right here.

860

Mr. Parmer: Come down, so we can see it.

The Court: Let the record show the witness tried at one place, tried a second place, and finally a third place. He finds a place that he says is rotten.

By the Court:

Q. That is correct, is it? A. Yes, sir.

By Mr. Parmer:

861

Q. Will you show us where that was, because you were a little too high for my eyes. A. You don't mind if I keep picking again till I find it?

Q. We want you to pick till you succeed or say you cannot.

The Court: Let the record show what the witness is doing, Mr. Parmer.

Mr. Parmer: The witness is examining the wood at various places again, looking for such a place.

862 A. It's rotted here (indicating), rotten in here.

Q. Wait a minute. A. First, one moment, please.

Q. Just a minute. The first place that you picked out was the place where it had been sawed, right here? A. No.

Q. Don't be so fast the next time. A. I had it up here. You couldn't see it. I am going to pick the pieces off here. You can mark it off. You can mark it off.

Q. Mr. Witness, you are now at the place where
863 the iron was. The question asked you was to go some place where the iron was not. A. I am going to show it was just rotten anyway. You can mark it off any place you want.

Q. Mr. Witness, I don't want to be severe at all, but would you mind attending to the question? We have been over the place where the iron was. Now I want you to go to a place where the iron was not. A. You want me to find another spot?

Q. That is what you said you were going to do. Isn't that what you said you were going to do? A. Not necessarily.

Q. Oh, well— A. Now, wait a minute. Don't
864 you want me?

Q. Maybe I misunderstood you. A. You want me to find another spot?

Q. Just one more spot where—from where the iron was that it was rotten. A. Just one moment. I am up here examining this too, you know, right here.

Q. You are now at the place where the iron was? A. Not right here. The iron is over here.

Q. Point it out to me. Never mind picking out a part. Now, you are pointing to something now

that you say is rotten, is that right? A. Partly rotten, yes. 865

Q. Why do you say it's partly rotten instead of wholly rotten? A. I will tell you why, just a moment, please,—partly rotten, there's a certain amount of this wood that that's good yet in here; 50 per cent of this wood, the tensile strength of it was there. 50 per cent was gone due to the deterioration.

Q. All right. What I want to know is what you have got to say about this wood you are pointing at. A. It's dry rot. 866

Q. Right here where I am pointing now? A. Yes.

Q. Let us mark it— A. Go ahead.

Q. —so we know what you are talking about. Put a little circle around it. Put it any place. A. Do you want me to mark other places where it is rotten?

Q. We will take one at a time, if you don't mind, so we know what we are doing. This place is surely rotten in your opinion, the part within the circle? A. I wouldn't say the entire circle. You drew a bigger circle than the part I broke out, but that is all right. Go ahead. Leave it go that way. 867

Q. Within this circle is the rotten part? A. Part of it. I don't say that is the only spot on there that is rotten. Now, remember that.

Q. At this point—what I mean is this—at this point here where we have got the circle,— A. Yes.

Q. —within it is a rotten part? A. Within it, yes.

Q. Do you notice that the wood has been

868 crushed at that point? A. I don't care whether it's crushed or not. I still say it's rotten.

Q. I asked you, did you notice it? A. Yes.

Q. Can you dig anything out of there with your fingers? A. I took a piece out for you before.

Q. I want you to come down and do it. A. I don't want to break my nails all part.

Q. I want you to come down now and do it before the jury. A. You are going to make me pick out a piece at that particular spot? Is that the idea?

869 Q. Yes. Do you see right there? A. Yes.

Q. Is that a rotten part? A. You want me to pick a piece out?

Q. I am asking you a question. A. I am not going to pick it out where your finger is. I am going to pick it out within the circle.

By the Court:

Q. Where counsel's finger is, is that the one? A. He has got a circle twice as big as his finger.

Q. Where he puts his finger, is that the rotten part? A. Right here is rotten.

870 Q. Where he holds his finger now, that is the rotten spot.

By Mr. Parmer:

Q. That is the rotten spot? A. What do you want me to do?

Q. Can you pick that out with your finger? A. No, I can't.

Q. Can you demonstrate that that is different in condition than any other part within the circle? A. Yes, I can.

Q. How are you going to demonstrate it? 871

Mr. Fisch: There.

A. Just one moment. There you are.

Q. You picked out a small piece. A. I picked a piece out where you asked me to pick it out.

Q. Can you pick out another piece? A. I am through picking out. My nails hurt. After all, my finger is not a tool.

Q. That's right. Now,— A. You pick a piece out too.

Q. Look here. I know I have picked out a piece. 872
That's true. I want to show you something. A. All right.

Q. Do you notice that much of the wood here is broken? A. Regardless.

Q. I asked you whether it was crushed before and you said it was. Do you notice that much of the wood is broken? A. It has been knocked around, certainly. It has. You can see it.

Q. Now, do you say that the broken and crushed parts of this wood are the same as the rotten? A. My contention is—

Q. Do you say that? A. Counsel— 873

By the Court:

Q. Cannot you answer the question yes or no? A. I don't know what he means.

By Mr. Parmer:

Q. Did you say that the parts of this wood that are broken and crushed are the same as you mean when you say that the thing is rotten? Is that

874 what you mean? A. The piece that I picked out was part of the rotten part.

Q. That is not an answer to my question. A. That is the way I interpret it.

Q. You said that a lot of these pieces in here are broken and crushed. A. That's right.

Q. Yes. Are those the pieces that you mean? A. The piece I picked—

Q. Listen, please. Are those the pieces that you mean that are rotten? A. No. No. No.

Q. You know there is a distinction between that then, between rotten and broken and crushed, 875 don't you? A. Yes.

Q. Now, you saw the place where I picked out a piece. Isn't that broken and crushed? Look at it, please. A. Not the piece I picked out, was not broken and crushed.

Q. I am asking you about one I picked. A. I wouldn't say yes or no on that.

Q. Will you look at that piece? A. I didn't see you pick that piece out. I don't know whether it was laying there or not. I couldn't answer that question.

Q. I thought you said it to the jury, that you 876 saw me pick one out. A. I wouldn't be fair in answering that question.

Q. All right. You must be fair. A. I am going to try to be fair.

Q. That's right. Do you see any broken and crushed pieces here? Do you see them? A. Just one moment. I have got to find out if they are loose or broken.

Q. I asked you if you can see any. A. I don't see any right now, outside of a little piece that is broken. How can I tell?

Q. Do you see that piece in there? A. I see that piece. 877

Q. Don't you see that it's broken or crushed? A. That little piece?

Q. Inside there? A. It might be—there's a possibility—but I can't tell whether it's fastened on the bottom or not.

Q. Do you see that there, there is a piece that has been broken and crushed? Isn't it? A. You don't have to break it. How am I going to tell?

Q. I am pointing to it. A. I want to see if it is loose. 878

Q. Look here. I am just touching it now. See how loose it is? It's a part that has been broken.

By the Court:

Q. Is that broken or crushed? A. It's loose in there. Naturally, that piece is loose.

Q. Was it broken or crushed? If you don't know, say you don't know.

By Mr. Parmer:

Q. Was it broken? A. The chances are, when this boom was broken— 879

Q. Aren't there many such pieces that you see there of that character? A. Yes. There are little splinters. If you look all over, you might be able to dig out a few pieces.

Q. Do you see that one moving in there now, when I touch it? A. That is right.

Q. Do you see right here a place where you picked out the piece? A. I didn't. Are you positive I picked it out there?

880 Q. Do you see the circle? A. Yes.

Q. The red circle still there? A. Yes.

Q. Now, do you see in the center of the circle the place that you did pick out that piece, a number of other small grain pieces? A. No, sir.

Q. Just one moment now, we will pick them out. A. Suppose that piece was, that little piece might have fell down when I broke it out.

Q. Just a moment. We will see about it. Do you see them coming out? A. Listen, counsellor, you might be breaking them out, I don't know.

881 Q. You can see what I am doing. A. I don't know that. I see one piece, but you are breaking it more.

Q. You have got a little pencil there? A. Certainly, I can—

Q. It's a probe, look at it, working. See it coming out? A. Certainly. It's due to the fact that it's rotted. You have got a little pencil there. Take it out all over the place where it's rotten.

Q. In other words, this place where it's broken, it is rotten, but this place where it's broken, it is broken? A. I told you there's a certain amount of good wood in there that has not deteriorated

882 as much as the other. Now, if—I am a carpenter.

Q. Yes. A. This is a piece of pine.

Q. Yes? A. You will notice here, all these circles—

Q. Yes? A. —there is a certain amount of sap left in that yet. You don't see and I don't see, you smell it; you smell it. This end, that sap, has deteriorated.

Q. You mean there isn't so much of it? A. That's right, due to the weather. I just want to explain what dry rot is to you. After a period of years,

this deterioration, this wood dries up thoroughly, 883
and each time it dries out, has a certain amount of rotting. That is why we call it dry rot.

Q. Do you mean—

The Court: Any further questions that you want?

Mr. Parmer: Just one or two and I am through.

Q. Do you think that because the wood is dry, it means it's dry rot? Is that the idea? A. Not 884
necessarily, no, because—

Q. Do you know? A. You cannot build a house with green lumber.

Q. How long ago do you think this accident happened? A. This accident happened—I don't even know, I tell you the truth.

Q. Well— A. The chances are it was mentioned in court, but I didn't pay no attention to it.

Q. Assuming it was January 27, 1944, and this piece of wood has been ashore ever since. A. Yes, sir.

Q. You might expect it to be somewhat dry by now? A. Wouldn't be any drier than the day it 885
was taken out, outside of the period of time that would take that certain amount of deterioration that would apply just the same as it did previous in the form of dry rot.

Q. Never mind about dry rot. It might be a little dryer than when you took it off the ship, don't you think? A. Well, not so much. There would be, as I told you before, the deterioration in all wood; no matter how old it is, as you go along each year, it deteriorates.

886

Q. Yes. Thank you very much. A. Don't ask me to tell you how much deterioration there is there in one year, because I couldn't do it. I am not smart enough.

Q. I am not going to ask you to. Thank you very much.

The Court: All right, you may take your cap, Mr. Steuerwald.

(Witness excused.)

887

The Court: Both sides rest? You rest, Mr. Parmer?

Mr. Parmer: I rest, your Honor.

The Court: Both sides rest. All right, motions.

Mr. Parmer: I renew the motions made at the end of the plaintiff's case, especially the second portion thereof. I think the first portion of it was based upon a failure to prove regulations, your Honor. Since they

888

have been proved, I am not so sure that it is relevant; but I move to dismiss the complaint and for a directed verdict on the ground that the plaintiff has failed to prove any cause of action against these defendants.

There is no evidence in this case that the defendant violated any duty it owed to the plaintiff. There is no evidence in this case that these defendants owned or controlled

or operated the vessel on which the accident happened. There is no evidence that they were the occupier of the premises on which the accident happened. There is no evidence that they supplied the appliances which it is claimed were defective and therefore caused the accident, that is, that they supplied them to this plaintiff for use by him. There is no evidence that these defendants invited the plaintiff to come on board the vessel; indeed, the evidence is to the contrary, that he came on board the vessel by reason of his employment by Jarka and that Jarka got its contract from the W.S.A. directly, and that the W.S.A. undertook to supply the equipment in sound condition, all of which this defendant had nothing to do with. 889 890

I also move to dismiss the complaint on the ground that even as respects any duties which these defendants had to the United States, there has been no evidence that there has been any breach thereof or failure on their part to perform their duties owing to the United States, and if there is no such evidence, it cannot be the foundation of any recovery against this defendant, because such duties were not owed by these defendants to the plaintiff. They were owed solely to the United States. 891

The Court: You also move on the ground that there is no proof of any misfeasance?

Mr. Parmer: Yes. In substance, I had intended to say that. I move to dismiss on the ground that there is no proof of any misfeasance on the part of this defendant and that the so-called nonfeasance—

892 The Court: —does not render the defendant liable to third parties.

Mr. Parmer: That is right.

The Court: I will reserve decision.

Mr. Parmer: Exception.

The Court: All right, ladies and gentlemen of the jury, we will recess until Monday, at 10 A.M. The evidence is now in. On Monday you will hear summations of counsel and the charge of the Court.

Do not discuss the case among yourselves nor permit anybody to discuss it with
893 you, and do not visit the scene of the accident. Ten o'clock Monday morning.

(Whereupon an adjournment was taken to Monday, June 11, 1945, at 10 A.M.)

Monday, June 11, 1945.

TRIAL RESUMED.

894 (Same appearances.)

Mr. Parmer: It is stipulated by and between the attorneys for the parties hereto that all of the orders, written orders and regulations, issued by the War Shipping Administration previous to the happening of the accident may be considered as in evidence in this case whether or not the physi-

cal papers have actually been brought to court and marked herein. 895

The Court: It is stipulated by and between the attorneys for the parties hereto that the life expectancy of the plaintiff is 21.63 years.

Mr. Parmer: Agreed to.

The Court: Whenever you are ready, gentlemen, you may sum up.

(Mr. Parmer summed up to the jury in behalf of the defendant.)

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The Court: Let the record show that Mr. Parmer consumed one hour and one minute, and you may be guided accordingly, Mr. Fisch.

(Mr. Fisch summed up to the jury in behalf of the plaintiff.)

The Court: Let the record show that Mr. Fisch consumed 54 minutes.

CHARGE TO THE JURY. 897

The Court: Members of the jury: The plaintiff, Peter Caldarola, brings this action against the defendant Thor Eckert & Company and he says that Thor Eckert & Company owe him money as a result of their negligence.

He says the particular negligence which caused his injuries was that on January 27, 1944, the starboard boom on the exhibit which has been offered in evidence here fell and gave way; and that the

reason for it falling and giving way was that the
898 defendant failed to use reasonable care in making a proper inspection and in furnishing proper ship's equipment, and to remedy any defect or danger which an inspection would show. The defendant denies this claim of negligence. So there you have an issue for you to decide.

Let us see what negligence is, because that is the basis for the plaintiff's complaint. Negligence is nothing more nor less than carelessness, the failure to do something that an ordinarily prudent person would do under similar circumstances.
899 Want or absence of due care, that is all negligence consists of. When I define negligence, the same definition is true with reference to contributory negligence. It means carelessness which assisted in bringing about the happening of the accident, want of due care which assisted in bringing about the happening of the accident.

When the plaintiff brings this type of a case, the law imposes a burden on him of establishing his case by the fair preponderance of the credible and believable testimony. In other words, to explain that legal verbiage, the law imposes a burden on the plaintiff to make out a better case than the defen-
900 dant. When the case starts out, the scales of justice are in even balance. If at the conclusion of the case the scales are in even balance, in other words, if you cannot make up your mind as to who has the right of the case and who has the wrong of it, then your verdict must be for the defendant. If at the conclusion of the case the scales are down ever so little in favor of the defendant, again, your verdict must be for the deendant. It is only when, at the conclusion of the case, the scales are down in favor of the plaintiff by the fair preponderance

of the credible and believable testimony, then and only then is the plaintiff said to have sustained the burden of proof. Then and only then is the plaintiff said to have made out a better case than the defendant. The plaintiff has the burden of proof of establishing the negligence or carelessness of the defendant and also of establishing the issue as to whether he himself was free from contributory negligence or not, because under our system of law and procedure, if the plaintiff contributed to the happening of this accident in any manner, shape, or form, no matter how small the degree, he is not entitled to recover. He must establish by the fair preponderance of the credible and believable testimony that he, the plaintiff, was free from contributory negligence or carelessness, and that the accident came about wholly and solely as the result of the negligence of the defendant that he sues herein. Now, on those issues, he has the burden of proof. 901 902

He also must show that his hurts came about and were the proximate cause of the accident. What do we mean by proximate cause? I am going to put it in fairly simple language. You have often heard the expression "but for". Proximate cause is one but for which the accident would not have happened. You may say to yourself, "But for the fault of the defendant, would this accident have happened?" Now, if the answer is one way, that will assist you in arriving at a verdict. If it is the other way, it will assist you in arriving at the opposite verdict, because the negligence must be the proximate cause of the happening of the accident; and if it is not, that is the end of the case. If it is, that is another element that the plaintiff is called upon to establish, and if he has established 903

that element, as well as the carelessness or negli-
904 gence of the defendant and his freedom from contributory negligence, then you may pass on to the question of damages. We will come to that in a few moments.

In setting up the question or the contentions of the various parties, it may be that I will refer to the evidence. When I refer to the evidence, I do not do so because I want to call your attention to a particular bit of evidence. I do not want you to think that I consider that particular bit of evidence more important than some other bit of evidence
905 that I do not mention. I want to caution you that, in referring to the evidence, if your recollection of the evidence differs from mine, it is your recollection that controls and not mine, because you are the sole judges of the facts. So, bear that in mind. I only refer to the evidence in assisting you to set up the various contentions of both parties, so that you may more readily solve the questions of fact which I am passing on to you to solve. I reiterate, bear in mind the caution that I have heretofore given you: If I refer to any evidence and your recollection is different from mine, it is your recollection that controls and not mine. The same is
906 true with regard to any reference made by the attorneys to the evidence in the case. If your recollection is at variance with either or both of the attorneys with reference to the evidence, it is your recollection that controls and not theirs.

The claim asserted by the plaintiff is a simple claim, as I understand it. He says, "My claim in this case is that I, the plaintiff, was injured through the negligence or carelessness of the defendant and that the negligence consisted in failing to inspect and thus discover a weak and un-

stable boom, the defects of which could have been discovered by the exercise of reasonable diligence or care; in failing, after inspection and discovery, to replace or renew this weak and unstable boom. 907

The defendant's claim, as I understand the defendant's claim, as has been advanced through the evidence offered here, is that the plaintiff's injuries were due to the fault or negligence of a fellow employee who fouled up the tackle, as has been explained to you, or to the fault of the War Shipping Administration, or for some other cause over which the defendant has no control and which is not chargeable to it.

I have already told you what negligence is. Let us see what is the basis for the plaintiff's claim. The basis for the plaintiff's claim is the general agency agreement which has been offered in evidence here. On that proposition, it is my duty to instruct you what the law is. When a contract is not ambiguous, it is the duty of the Court to instruct the jury with reference to the contract. Inasmuch as the basis of plaintiff's claim is this contract, I am now going to charge you what I say the contract means. This is not the ordinary case of negligence, because the defendant does not have the whole control of this vessel. The defendant's control of this vessel is limited by this general agency agreement and the rights and duties of these parties are accordingly so limited. You will have to decide this case within the limitations of the general agency agreement, and I propose to tell you what it means. With reference to the general agency agreement, Article 14 of that agreement—and I base my ruling of limited control on that article as well as other articles of the agreement to which I will refer in my charge—Article 908 909

14 of that general agency agreement, in substance
910 and effect, states as follows: It prescribes that the defendant shall arrange for the repair of the vessel covering the hull, machinery, boiler, tackle apparatus and equipment, and spare parts, and including the maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessel in a fairly efficient state of repair and condition.

It further prescribes that the general agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessel
911 and shall advise the United States from time to time in order that the United States may satisfy itself that the vessels are being properly maintained, and shall co-operate with the representatives of the United States in making any inspection or inspections that the United States may deem desirable.

Under certain limitations, the defendant has some duty of maintaining the gear in a reasonably safe condition.

I charge you that in this case the Steamship Everagra is not owned or chartered by the defen-
912 dant. I charge you that the officers and crew were not the servants of this defendant, neither were they their employees.

I charge you that there is a certain duty of maintenance and repair of the ship's gear and its condition to be carried out by the crew of the Everagra. They are not the servants or employees of the general agent for that particular purpose. The masters and members of the crew of the Everagra were employees of the United States of America and the general agents are not responsible for the acts of the master, officers, and crew.

The defendant Thor Eckert & Company did not supply this boom for any of the vessel's equipment 913
to the plaintiff or to the other longshoreman employed by Jarka & Company; and as a matter of fact, the boom and the rest of the equipment of the vessel, which was the property of the United States, was supplied by the United States of America to the plaintiff and his fellow employees for their own use. This defendant had nothing to do with the supplying of this equipment. This defendant had no relations at all with the plaintiff's employer, Jarka & Company, and did not make the arrangements with Jarka & Company for the work that 914
the company was hired to do on this vessel. The matter of the loading or unloading of the Steamship Everagra at the time of the happening of the accident was entirely out of the hands of the defendant. With regard to such matters, it didn't even act as agents for the United States of America.

In considering the rights and obligations of these parties within the limitations of the general agency agreement, I charge you that the general agent was an agent and not an independent contractor. I charge you that the general agency agreement, Article 1 thereof, required the general agent to 915
manage and conduct the business of the vessel. The agency agreement did not require him to manage and conduct the vessel, but it did require him to manage and conduct the business of the vessel. You will find that in Article 1 of the general agency agreement.

On Article 2 of the general agency agreement, and it is in evidence here, the general agent agreed to manage and conduct such business in accordance with such directions, orders, or regulations

as the United States has prescribed and from time
916 to time may prescribe and upon the terms and conditions provided in the agency agreement. That is found in Article 2.

With respect to the crew, Article 3-A, subdivision D, provides that the general agent's only duty was to procure them. That was the duty which the general agent owed under the agency agreement.

The agent also, under Article 3-A, subdivision C, had a duty to equip, victual, supply, and maintain the vessels subject to such directions, orders,
917 regulations, and methods of supervision and inspection as the United States may from time to time prescribe.

Article 14, which I have already referred to, places a duty on the general agent or arranging for the repairs of the vessel as may be necessary to maintain the vessel in a thoroughly efficient state of repair and condition. This duty is imposed on the general agent subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States. In order to determine the extent of the agent's duty in this respect, it is necessary
918 to know something about the regulations, instructions, and what the methods of supervision and inspection are or were.

Article 14 also requires the general agent to exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels and to so advise the United States from time to time in order that the United States may satisfy itself that the vessels are being properly maintained.

That contract does not impose any duty on the general agent to make inspections and obtain information for the purpose of keeping the vessel in sound repair and sound condition. It merely requires the general agent to make the inspection and furnish the information to the United States so that the United States may take such action in the premises as they deem fit and proper. 919

Under the general agency agreement, I charge you that the general agent is not given control of the vessel either by the contract or in fact, but that his control is a limited control. So far as the contract is concerned, the vessel remains within the control of the United States of America through the Master who is the agent and employee of the United States of America (Article 3-A, Subdivision D, of the general agency agreement). 920

I charge you that if the general agent were given control of the vessel under a contract which requires it to make repairs, and just that, there would be a different case from the case at bar. In that case, you would have a case where the general agent, by reason of the control of the vessel, would be the supplier of the vessel's equipment to the longshoreman. The equipment in this case was supplied by the United States of America. 921

Further, I charge you that the agreement between the United States and the general agents who are the defendants, placed upon the defendant a responsiblity to use reasonable care within the terms of the contract in inspecting, repairing, and replacing, when necessary, the ship's boom, so that it would reasonaby fit and safe for the work for which it was intended. The boom which was in use at the time of the accident was part of the ship's equipment. I so charge you.

I charge you that if the jury should find that
922 the plaintiff was free from any negligence contributing to the happening of the accident and should the jury further find that the manner in which the longshoremen were doing their work did not contribute to the happening of the accident, but that the boom was defective, and that the defendants failed to use reasonable care in inspecting, repairing, and replacing the boom, within the terms of the contract, and that such failure to inspect, repair, and replace the said boom was the proximate cause of the accident, then the plaintiff would be
923 entitled to a verdict against the defendant.

I also charge you that if the jury should find the plaintiff free from negligence contributing to the happening of the accident and should the jury further find that the negligent acts of the longshoremen, other than the plaintiff, combined with the negligence of the defendant in failing to inspect, repair, and replace the boom, within the terms of the contract, the plaintiff would then be entitled to a verdict against the defendant, as the plaintiff has a right to recover against one or more joint tort feasors.

I also charge the jury that if the jury should
924 find the plaintiff free from any negligence which contributed to the happening of the accident and if the jury should find further that the defendant was negligent and that the manner in which the longshoremen performed their work was also negligent and that the negligence of the defendant and the negligence of the longshoremen, other than the plaintiff, combined to produce the injury to the plaintiff, then the fact that the plaintiff's employer has not been brought into court as a party defend-

ant will not operate to discharge the defendant, as the injured party may sue one, any, or all wrong- 925
doers.

If the jury should find that an inspection of the boom was made prior to the happening of the accident, but that such inspection was not efficiently made, within the terms of the contract, and that the boom was defective at the time of the inspection, then the jury may find the defendant guilty of negligence in failing properly to inspect and replace the boom, within the terms of the contract.

I charge the jury that the master and all of the officers and members of the crew of the Steamship 926
Everagra at the time of the accident were employees of the United States of America; that neither the master nor any officer or member of the crew of the Steamship Everagra at the time of the accident was an employee of the defendant, and the relationship of master and servant did not exist between the defendant and such persons. The defendant is not liable to the plaintiff for any act or for any failure to act on the part of the master or for any officers or members of the Steamship Everagra, whether such act or failure to act was negligent or not.

I charge the jury that at the time of the accident 927
and during all the times that the plaintiff was on board the Everagra and up until the time of the accident, the Steamship Everagra was not owned by nor in the possession of the defendant; that the plaintiff came on the vessel and was on the vessel at the time of the accident solely by reason of the invitation of the United States of America, which owned and possessed the vessel; that this defendand did not invite the plaintiff to come on board the vessel nor to be there at the time of the accident

or any time prior thereto; that the plaintiff was
928 not the business invitee of this defendant while he was on the Steamship Everagra and therefore this defendant did not owe to the plaintiff the duty of exercising reasonable care to have the premises, that is, the boom, in safe condition so far as that duty would arise from the relationship of an occupier of the premises and a business invitee.

I charge the jury that the United States supplied to the plaintiff the boom and other equipment, which the plaintiff was using at the time of the accident for use by the plaintiff in the performance
929 of his work. The defendant did not supply the boom and other equipment to the plaintiff for use by him in the performance of the work at the time of the accident and the defendant therefore did not owe to the plaintiff the duty of exercising reasonable care to have the boom and other equipment in safe condition so far as that duty would arise between the parties if the defendants had supplied the boom and equipment.

The defendant did not have any power or authority to prevent the plaintiff or anyone else from coming on board the vessel previous to the accident, nor any power or authority to remove him
930 or anyone else from the vessel at any time before the accident. Pursuant to the requirement of the United States of America, the only agents of the United States who were caring for the interests of the United States in connection with the Steamship Everagra, while the plaintiff was on board her, were the berth agents Moore-McCormack Steamship Company who arranged for placing the vessel at the pier where it was and also arranged for the discharge of the cargo.

I charge the jury that it is for the jury to say, under all the facts and circumstances in the case, and bearing in mind the general agency agreement, whether the general agent's duty of inspection went no further, under the evidence in the case, than to receive information from the ship's officers as to those parts of the vessel which needed repair, to verify such information, and to transmit said information to the United States of America. I say that is for the jury to say under all the facts and circumstances as to whether or not that is what a reasonably prudent person would do under the circumstances. If you say that a reasonably prudent person under the circumstances, and under the limited control as evidenced by the general agency agreement, if you say that a reasonably prudent person under the circumstances, whether it would be enough for that reasonably prudent person to accept the reports of the ship's officers with reference to inspection and what was necessary to repair, if you feel that is what an ordinary prudent person would do under the circumstances, that is the end of the case. Bring in a verdict for the defendant. If you feel that an ordinarily prudent person should go further and make inspections himself under the terms of the general agency agreement, that is for you to say. That is a question of fact which I pass for you to solve.

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In performing the duties of inspecting the vessel in order to ascertain what part of it was in need of repairs, I charge you that the officers and members of the crew were acting solely as agents and employees of the United States and were not acting in any way for these defendants.

I charge you that under the evidence in this case
934 this defendant, as general agent, had no obligation with respect to repairs of the vessel other than to arrange with some independent contractor to make repairs when they were under $10,000. I say it is for you, the jury, to decide as a question of fact as to whether or not the defendant in this case in the exercise of ordinary care and prudence would inspect and order repairs other than the repairs evidenced by a requisition to the defendant, made at the close of a voyage, by the master. In other words, in the exercise of ordinary care and prud-
935 ence, should the agent take the master's requisition and should that discharge the agent from liability in the exercise of ordinary care and prudence? If you believe it should, that ends the case and you are entitled to bring in a verdict in favor of the defendant. If you believe the agent should go beyond the master's requisition and send somebody on to make an inspection for his own satisfaction, then you may say that the agent has not lived up to the terms of the general agency agreement; and on that, you may predicate a finding of carelessness or negligence, and find for the plaintiff.

936 I say it is for the jury to say under all the facts and circumstances and in view of the limited control as evidenced by the general agency agreement whether the defendant should make an independent inspection of the vessel to discover any defects which may have been overlooked by the officers of the vessel and omitted from the requisition for repairs prepared by the officers. That is for you to say, and that is a question I am passing to you for your decision as a question of fact. Should the general agent take the requisition of the officers?

Should the general agent make an independent investigation, to satisfy itself? That is for you to say, what should be done under the rules I have already given you. The rule that you should apply in determining what should be done is, What would a reasonably prudent person do under the same circumstances or similar circumstances? Would the reasonably prudent person take the master's requisition, or send some of his own employees on to make an inspection? That is for you to say. 937

I charge the jury that the privilege that the defendant had to go aboard the vessel for inspection, so that they could later arrange for repairs, had no bearing upon the question of control. The privilege which the defendant had to go aboard the vessel for inspection so that they could later arrange for repairs is not in and of itself sufficient to establish control of the vessel by this defendant. The defendant did not have any authority to instruct the officers and crew not to permit the stevedores, including the plaintiff, to use the boom which it is alleged caused the accident. This defendant did not have any authority to instruct the longshoremen, including the plaintiff, not to use the boom which it is alleged caused the accident. 938 939

There is no evidence in the case that the defendant ever received any actual notice from the officers of the ship or from anyone else before the accident happened that the boom was not in good and sound condition. The fact that the general agent was required by the contract and therefore did go on board the vessel from time to time in the performance of services for the United States is not in and of itself sufficient to establish control of the vessel by this defendant. The fact that pur-

suant to the general agency contract this defend-
940 ant was obligated to and did transmit orders from the United States to the captain and members of the crew from time to time is not in and of itself sufficient to establish control of the vessel by this defendant. The fact that this defendant was required by the general agency contract and therefore did give instructions to the master and officers of the crew of the Steamship Everagra from time to time is not in and of itself sufficient to establish control of the vessel by the defendant. The fact that the general agency contract required the de-
941 fendant to perform for the United States services mentioned therein and that the defendant performed those services is not in and of itself sufficient to establish control of the vessel by the defendant.

I charge you that under the evidence of the case you can find that, preceding the happening of the accident on January 27, 1944, the repairs required on the Everagra as evidenced by the master's requisition, amounted to more than $10,000. I charge that under the terms of the general agency agreement and the orders and regulations issued pursuant thereto, the matter of arranging for all repairs on the vessel was in New York subsequent to said voyage and up to and including the time of
942 the accident was reserved by the United States to itself and this defendant did not have any duty to arrange for any repairs at that time, because the repairs as evidenced by the master's requisition exceeded $10,000. That is the law of the case, as evidenced by the general agency agreement.

I have taken a long time to charge you, because it is very involved and intricate. I do so only for the purpose of assisting you to decide the questions of fact in the case, which I limited by reason

of the general agency contract. That is my duty, to instruct you as to what I think the agency contract means, and it is your duty to solve the questions of fact in keeping with the instructions that I have given you. 943

If you find that the plaintiff has sustained the burden of establishing the negligence of the defendant and that he, the plaintiff, is free from contributory negligence and that the negligence of the defendant was the proximate cause of the accident but for which the accident would not have happened, then you may pass on to the question of damages. Because I charge you on the question of damages, I do not want you to get the idea that I think you are going to give any damages in this case. I have no such opinion, it is not part of my province; but it is an issue which comes into a case of this kind and character, and it is the duty of the Court to charge you on every issue involved in the case. Therefore, if you find for the plaintiff on the issues which I have already discussed, you are entitled to come to the question of damages. When you come to the question of damages, you are entitled to award this plaintiff such compensation as you think would satisfy him for the hurts that he received, the injuries that he received in this accident. 944 945

You are entitled to take into consideration his pain and suffering, if you believe he had any pain and suffering; his out of pocket expenses, that is, his loss of wages, if you believe that he has lost wages as a result of the hurts that he received in this case. You are entitled to take into consideration his out of pocket expenses, whether he paid the doctors and hospitals; whether he paid them or not, you are entitled to take into consideration

the fact that he is obligated to pay the doctors.
946 There is no testimony in the case, as I recall it, that there was any obligation to pay the hospital bills. There is no proof of the hospital bills in the case, but there was a doctor here who testified, Dr. Patella, and as I recall it, and it is your recollection that controls, there was a four or five hundred dollar bill due and owing to him.

There is a sharp dispute in the case with reference to injuries. The plaintiff says he was hit by this boom. He told you about being in the hospitals. He says in substance and effect, "I have never worked since." His doctors say, in substance
947 and effect, that that is due to a condition known as post concussion syndrone or, as the second doctor described it, traumatic neurosis. The doctors say that is a condition of nerves or a brain condition, that it's real as far as the plaintiff is concerned; and that he cannot work by reason of the condition.

The doctor called by the defendant, who examined him, says, "No such thing." He says, "I went all over the man neurologically. I cannot find any evidence of any neurological manifestations whatsoever. The man is a sick man. He
948 has had diabetes for years. The only thing I can find about him objectively is some diminution of his hearing that did not come about as a result of the accident." He says that his reflexes—you recall he told you how he tested the reflexes—"I find some lessening of the reflexes, but that could come about as a result of the diabetes."

So you see you have an equally sharp conflict on the question of hurts and injuries as well as an equally sharp conflict on the question of negligence or carelessness. That is for you to say under all the facts and circumstances.

With reference to the expert witnesses in the case, there have been a number called. They have called medical witnesses and both sides have called experts with reference to the wood. With reference to expert testimony, I charge you that you may properly weigh such testimony and that when such testimony is given in answer to a hypothetical question, its weight depends entirely upon whether or not the facts recited therein were established by the evidence. In all cases, it depends upon the knowledge, accuracy, and honesty of the witness; but the testimony of all the physicians and experts, whether with respect to what they have seen or observed, or with respect to their opinions on an assumed state of facts, is not to be rejected or accepted at will but is to be weighed and considered the same as any other evidence, you being of course at liberty, after weighing and considering such testimony, to believe it, if probable, or to disbelieve it, when it is improbable, or when it is discredited or disproved by other testimony in the case, or when you believe the witness testified falsely when he was examined with reference to any fact or opinion. 949 950

I also charge you too under the laws of the State of New York, ladies and gentlemen, if you believe that any witness has testified wilfully falsely to a material fact in this case, you must reject that portion of his testimony or her testimony which you believe to be false. As to the balance of his or her testimony, the law gives you an option. You may accept such portion of it as you believe to be true or you may reject the entire testimony. Apply the same test to that testimony as you would to an apple which you picked up from your kitchen table. If it has a spot on it, the spot 951

is the perjured testimony. Cut it out. Throw it
952 away. The law says you must do that. As to the balance of the apple, you may eat it or not as you see fit.

This case has taken a long time to try, ladies and gentlemen. It is a very important case. It is important for the plaintiff; it is important for the defendant. You have taken an oath here to decide this case fairly, without fear, favor, bias, prejudice, or sympathy, and that you must do. When you do that, in keeping with your oath as jurors, then you have discharged your duty toward
953 the parties in this case and to the Court and the Commonwealth of the State of New York which brought you in here to serve as jurors in this cause.

I think I have told you everything that you need to know to consider the case. I want you to take the case and I want you to work even justice between the parties in keeping with the instructions that I have given you and in accordance with the testimony which you gleamed from the mouths of the witnesses and from the exhibits.

If you wish the exhibits, notify the court officer and I will have the exhibits sent to you.

First of all, are there any exceptions to the main
954 charge?

Mr. Fisch: Yes, there are.

The Court: Very good, sir.

Mr. Fisch: Does your Honor want me to state them now?

The Court: State them now.

Mr. Fisch: We except to that portion of your Honor's charge to the jury wherein your Honor in substance or in effect left it to the jury to determine the duties on the part of the defendant as that, we contend, is a question of law for the Court.

The Court: In what particular respect do you say I left any duty? I agree with you, Mr. Fisch, as far as the contract is concerned, I must charge the jury what the contract meant, and I felt that I have done that. If you can point out specifically where I am in error, I will be glad to correct myself. 955

Mr. Fisch: Yes. I am coming to that. I except to that portion of your Honor's charge wherein your Honor stated that the plaintiff was not an invitee of the defendants.

I except to that portion of your Honor's charge where your Honor stated that the defendant owed no duty to the plaintiff, in words or in substance. 956

I except to tthat portion of your Honor's charge where your Honor states in substance or in effect to the jury that the employees, when making an inspection of the equipment, were not the employees or the agents of the defendant.

I except to that portion of your Honor's charge when your Honor stated in substance and in effect that the United States may take such action with reference to the repairs as it deems necessary, and I ask your Honor to charge the jury that (Exhibit 8) it is the duty of the agent to arrange and see to it that the repairs are made and to hand out bids for the same. 957

I ask your Honor to charge the jury that under the contract it is not enough for the agent to take the reports of the crew or the master, he cannot delegate his duty, that the contract places upon him to see it and inspect all repairs and replacements, and merely accept the word of the master that everything is O. K. or all right.

I except to that portion of the charge wherein your Honor stated in substance or in effect that the

repairs on his voyage amounted to over the sum of
958. $10,000; and in that connection, I ask your Honor to charge the jury that, in Exhibit 8, irrespective of the amount of the repairs, it is for the agent to arrange for them. It is for the agent to give out the contracts for them. It is for the agent to see that the work is being completed in accordance with, of course, the regulations of the War Shipping Administration.

I except to that portion of your Honor's charge where your Honor left it to the jury to say whether the jury should accept the evidence the fact or the
959. proof that the master would report to the agent that everything is all right or whether it was the duty on the part of the agent, within the terms of the agreement, to have gone aboard the vessel and to satisfy himself that the equipment was in good condition. In that connection, I ask your Honor to charge the jury that the agent could not delegate his duties of performance under the contract to anyone else, and that if it did delegate that duty to anyone else, the agent, in that limited sense, would be responsible for the failure of any other person who was doing the work for the agent to make repairs, to make a proper inspection, and ar-
960. range for repairs and replacements.

We except to that portion of your Honor's charge to the jury where your Honor stated that the crew or the War Shipping Administration was in control of the operation of the vessel; and in that connection, we say to your Honor that the plaintiff's claim is not based at all upon the operation of the vessel. It is based only on the duty that the agent has under the contract to make, to arrange for repairs, to make inspection and replacement.

Charge to the Jury.

The Court: I so charge as you requested in the last. I think I have told that to the jury. 961

In connection with your exceptions, at this time, I will let my main charge stand, but I will charge the jury that, pursuant to Plaintiff's Exhibit 8, which is in evidence here, repairs to be ordered by general agent, that in instances where vessels owned by or under bare boat charter to the United States and assigned to the general agents under service agreements with the War Shipping Administration require repairs (other than structural changes, arming, degaussing, defensing and installation of convoy operating measures) involving the 962
expenditure of not more than $10,000 in respect to any one voyage, the general agents shall arrange for and order the performance of such repairs without prior written approval of the local manager, Maintenance and Repair Division. However, general agents shall promptly notify, and obtain written approval from, the local manager, Maintenance and Repair Division, whenever it becomes apparent that actual expenditures will exceed the prescribed limitation of $10,000. And that, subject to the foregoing, general agents shall determine the repairs necessary; arrange with the Coordinator for ship repairs and conversion for designation of 963
the shipyards which are to perform the work; arrange with local manager for drydocking and other surveys, and for inspectors to view the work when the cost of repairs may exceed the prescribed limit; prepare and submit specifications in sufficient detail to describe fully the work to be performed, forwarding a copy to the local manager. Specifications must show the classification of the work, such as hull, engine, steward's department, insurance and improvements. Place in hand and award con-

tract for repairs. Supervise to completion, irre-
964 spective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and Navigation, and approved changes and improvements; obtain completion certificates, signed by a representative of the general agent, the master or chief officer, and chief engineer, showing that the repairs have been completed.

General agents are to award the repairs subject to the terms of the current basic (master) contract in effect between the contractor and the War Ship-
965 ping Administration, or, in the absence of a holder of a basic contract for such repairs as required, the general agent shall award the repairs on a cost plus fixed fee basis, provided the fixed fee does not exceed seven per cent of the cost, based on an estimate made by the general agent before work commences, and the form of contract conforms, as far as practicable, to standard forms of contract approved by the Administrator.

General agents shall make no structural changes in the vessel, and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance, first securing the
966 written approval of the local manager, Maintenance and Repair Division.

The payments for all repairs awarded by the general agents in accordance with this order are to be made by them directly to the repair contractors and charges therefor should be included in the voyage accounts.

Repairs to be ordered by the Maintenance and Repair Division: Specifications are to be prepared, and contracts awarded, by the Maintenance

and Repair Division, in accordance with basic (Master) contracts, or subject to the terms of a basic contract to be executed by the contractor by whom the repairs are to be made, in all instances involving the following categories: 967

Repairs to vessels owned by, or under bareboat charter to the United States and assigned to general agents under service agreements with the War Shipping Administration, involving the expenditure of more than $10,000. in respect to any one voyage, except in an instance where the general agents arrange for and order the performance of such repairs on the basis of estimates indicating that their cost will not exceed $10,000 and it later developes that the actual expenditures exceed that limitation. 968

Special service requirements, arming, degaussing, and installation of defense features.

Repairs to vessels owned by, or under bareboat charter to the United States but not assigned to a general agent under a service agreement, and repairs to vessels under time charter to the United States when such repairs are determined to have resulted from a risk assumed by the War Shipping Administration under such time charter.

The Payments for all repairs awarded by the Division of Maintenance and Repair, in accordance with this order, are to be made by the War Shipping Administration directly to the repair contractor upon receipt of properly executed public vouchers. 969

In connection with your requests to charge, Mr. Fisch, I have already charged requests 1, 2, 3, 4, 5, 6, and 7, with the exception that I interpolated in some of them "within the terms of the contract." I have refused to charge 8 and 9, except as I have otherwise charged.

Mr. Fisch: May 1, for the purpose of the record,
970 put in 8 and 9, please?

The Court: Certainly.

Mr. Fisch: Before I do that, there is one request the plaintiff would prefer to have charged, standing alone. May I have that exhibit, your Honor, Exhibit 8, please?

The Court: Are you still on exceptions, or are you going to requests?

Mr. Fisch: Requests.

The Court: You are through with exceptions. All right. Plaintiff's requests.

971 Mr. Fisch: There are really two small requests, very short. We ask your Honor to charge the jury that it was the duty of the defendants to supervise the completion irrespective of the amount to be expended on maintenance and insurance, repairs, including the requirements of the classification, Society and Bureau of Marine Inspection and Navigation, and approved changes and improvements.

I so charge. I have already charged it.

Mr. Fisch: Well, I just wanted to separate it. We ask your Honor to charge the jury that the payments for all repairs awarded by the general agent
972 in accordance with this order are to be made by them directly to the repair contractors and charges therefor shall be included in the voyage accounts prescribed in Fiscal Regulation No. 1.

The Court: I so charge. I think I have already charged it. I charge it again.

Mr. Fisch: This is the last request on this proposition. We ask the Court to charge the jury that it is the general agent's duty, that is, the defendant's duty, to place in hand and award contracts for repairs.

The Court: Let me see that. Just pick that out, will you, please? 973

Mr. Fisch: That would be "E".

The Court: I have already charged that and I charge it in connection with the entire paragraph, beginning with Paragraph 2. I will not divorce it from its context and charge it in just the language you request it, but I will tell the jury I have charged that in exactly that language, but in connection with the entire paragraph.

Mr. Fisch: May we then put the request—

The Court: Yes.

Mr. Fisch: —eight or nine, which your Honor 974
refused, on the record, after the jury retires?

The Court: Yes, you may.

Mr. Fisch: May we also request your Honor to submit that your Honor has now asked the jury to pass upon certain portions of the contract as to whether or not a reasonable person should or should not have done certain things as mentioned in the contract and submit both the contract and the Exhibit 8 to the jury?

The Court: I have not called upon the jury to interpret the contract. I know that is not the law and I would not do it. I have interpreted the contract. Now, what is the balance of your request? 975

Mr. Fisch: The request that, in view of the fact that your Honor has stated to the jury it's for them to say whether the jury should have accepted—

Mr. Palmer: Whether the jury?

Mr. Fisch: It is for them to say whether the agents should have accepted the reports of the Master as to repairs or whether they should have gone aboard the boat to make that inspection them-

selves. Your Honor left that to the jury as one of
976 fact. Under those circumstances, we ask your Honor to give both contracts, both the contract and the interpreted bulletin to the jury, because they cannot determine that question without a reference to the contract.

The Court: They are in evidence. I see no objection. Have you any objection to the exhibits being given to the jury, Mr. Parmer?

Mr. Parmer: I have no objection to those parts of the exhibits which deal with those matters, being given to the jury.

977 The Court: I am going to give both the exhibits to the jury. They are marked in evidence, and they may read them if they wish. If they wish them interpreted, they can ask me and I will interpret them further.

Mr. Parmer, I have already charged your Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. I refused to charge No. 12. I have refused to charge in the exact language No. 13. I have charged No. 14. I have charged No. 15 but modified it by dropping out the last three lines. I have refused to charge No. 16. I have charged Nos. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26. Take an exception to my refusal to charge as re-
978 quested.

Mr. Parmer: Yes, sir, I take exception.

I also except to your Honor's leaving to the jury as a question of fact whether there was any violation of duty on the part of the defendant in failing to go further than the requisitions which were or may have been prepared by the crew. I ask your Honor to decide that question as a matter of law and to charge the jury that, as a matter of law, there was no duty on the part of the defendant in that respect.

The Court: I refuse to charge as requested.

Mr. Parmer: Exception. 979

Then I ask your Honor to charge one more request. Even though the condition of the boom was not of the best and was not in what might be called good condition, if it were strong enough to lift the cargo without breaking, when the equipment was used properly by the longshoremen, and the longshoremen did not use the equipment properly and so caused the accident, there is no liability on the defendant.

The Court: I so charge.

Mr. Fisch: We respectfully except. 980

The Court: Ladies and gentlemen of the jury: I want to tell you this, that we like to have unanimous verdicts. If you cannot all agree, at any time that ten of your number have agreed on a verdict, you can notify me and I will have it recorded as the verdict of the jury.

One other thing. There has been a request here with reference to witnesses, and I charge you that the failure of a party to testify or produce evidence, within its control, does not permit any inference as to what the testimony would have been, but justifies the jury to take the testimony that is in the record most strongly against the party who is in 981 a position but fails to contradict it.

If you find a verdict for the plaintiff, you bring in a sum of money which you think will adequately compensate the plaintiff for his pain and suffering, for his hurts, for his out of pocket expenses—a verdict for the plaintiff, Peter Caldarola, in a sum of money.

If you find a verdict in favor of the defendant, all you have to say is, "Verdict for the defendant."

Take the case, ladies and gentlemen and work even justice between the parties.

PLAINTIFF'S REQUEST TO CHARGE

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1. The agreement between the United States and the general agents, who are the defendants, placed upon the defendants the duty to use reasonable care in inspecting, repairing and replacing when necessary the ship's boom so that it would be reasonably fit and safe for the work for which it was intended.

2. The boom which was in use at the time of the accident was a part of the ship's equipment.

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3. If the jury should find that the plaintiff was free from any negligence contributing to the happening of the accident, and should the jury further find that the manner in which the longshoremen were doing their work did not contribute to the happening of the accident, but that the boom was defective, and that the defendants failed to use reasonable care in inspecting, repairing and replacing the boom, and that such failure to inspect, repair and replace the said boom was the proximate cause of the accident, then the plaintiff would be entitled to a verdict against the defendants.

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4. If the jury should find the plaintiff free from any negligence contributing to the happening of the accident, and should the jury further find that the negligent acts of the longshoremen, other than the plaintiff, combined with the negligence of the defendants, in failing to inspect, repair and replace the said boom, the plaintiff would then be entitled to a verdict against the defendants as the plaintiff has a right to recover against one or more joint tort-feasors.

Plaintiff's Request to Charge.

5. If the jury should find the plaintiff free from any negligence which contributed to the happening of the accident, and if the jury should further find that the defendants were negligent and that the manner in which the longshoremen performed their work was also negligent, and that the negligence of the defendants and the negligence of the longshoremen other than the plaintiff combined to produce the injury to the plaintiff, then the fact that the plaintiff's employer has not been brought into court as a party defendant will not operate to discharge the defendants, as the injured party may sue one, any, or all wrongdoers. (From the opinion in the case of Wold v. Elder Dempster, 210 App. Div., page 4664.) 985 986

6. If the jury should find that an inspection of the boom was made prior to the happening of the accident but that such inspection was not efficiently made, and that the boom was defective at the time of the inspection, then the jury may find the defendants guilty of negligence, in failing to properly inspect and replace the said boom.

7. Where witnesses to an accident were equally available to be called as witnesses by either party, and were in court, the fact that neither party called them as witnesses does not raise any presumption that had they been called they would have testified in favor or against any of the parties. 987

8. The duty to inspect, repair and replace the boom when necessary rested upon the defendants and that duty could not be delegated by them to anyone else.

988 9. The duty to inspect, repair and replace the boom when necessary rested upon the defendants and if the defendants relied upon the others to perform that task, then the defendants would be liable for an improper inspection, repair and replacement of that boom.

DEFENDANTS' REQUESTS TO CHARGE

1. The Master and all of the officers and members of the crew of the steamship Everagra at the time of the accident were employees of the
989 United States of America.

2. Neither the Master nor any officer or member of the crew of the steamship Everagre at the time of the accident was an employee of the defendants, and the relationship of master and servant did not exist between the defendants and such persons.

3. The defendants are not liable to the plaintiff for any act or for any failure to act on the part of the Master or of any officers or members of
990 the crew of the steamship Everagre, whether such act or failure to act was negligent or not.

4. At the time of the accident and during all the times that the plaintiff was on board the steamship Everagra before and up to the time of the accident the steamship Everagre was not owned by nor in the possession of the defendants.

5. The plaintiff came on the vessel and was on the vessel at the time of the accident solely by

reason of the invitation of the United States of America, which owned and possessed the vessel. 991

6. These defendants did not invite the plaintiff to come on board the vessel nor to be there at the time of the accident or at any time prior thereto.

7. The plaintiff was not the business invitee of these defendants while he was on the steamship Everagra, and, therefore, these defendants did not owe to the plaintiff the duty of exercising reasonable care to have the premises, i.e., the boom, in safe condition so far as that duty would arise from the relationship of an occupier of premises and a business invitee. 992

8. The United States supplied to the plaintiff the boom and the other equipment which the plaintiff was using at the time of the accident for use by the plaintiff in the performance of his work.

9. The defendants did not supply the boom and the other equipment to the plaintiff for use by him in the performance of the work at the time of the accident, and the defendants therefore did not owe to the plaintiff the duty of exercising reasonable care to have the boom and other equipment in safe condition, so far as that duty would arise between the parties if the defendants had supplied the boom and equipment. 993

10. The defendants did not have any power or authority to prevent the plaintiff or any one else from coming on board the vessel previous to the accident; nor any power or authority to remove him or anyone else from the vessel at any time before the accident.

994 11. Pursuant to the requirement of the United States of America, the only agents of the United States who were caring for the interests of the United States in connection with the steamship Everagra, while the plaintiff was on board the vessel, were the berth agents Moore-McCormack Steamship Company who arranged for placing the vessel at the pier where it was and also arranged for the discharge of the cargo.

995 12. The duties which the defendants had agreed to perform for the account of the United States pursuant to the General Agency Agreement were owed solely to the United States of America and were not owed to the plaintiff.

13. The obligation to the United States of the defendants under the General Agency Agreement with respect to inspection of the vessel went no further under the evidence in this case than to receive information from the ship's officers as to those parts of the vessel which needed repair, to verify such information, and to transmit said information to the United States of America.

996 14. In performing the duties of inspecting the vessel in order to ascertain which part of it was in need of repair the officers and members of the crew were acting solely as agents and employees of the United States, and were not acting in any way for these defendants as agents of the United States.

15. These defendants as general agents had no obligation with respect to repairs of the vessel other than to arrange with some independent contractor

to make said repairs when they were under $10,000 and the only repairs with respect to which such an obligation arose were those which were disclosed to the agents by the ship's officers. 997

16. There is nothing in the General Agency Agreement or regulations which obligated the defendants to make an independent inspection of the vessel to discover any defects which may have been overlooked by the officers of the vessel and omitted from the requisitions for repairs prepared by the officers.

17. The privilege which the defendants had to go aboard the vessel for inspection so that they could later arrange for repairs has no bearing upon the question of control. The foregoing was charged by the court in Lafredo v. Bush Terminal Company, 261 N. Y. 323. See Record on Appeal, p. 189. 998

18. The privilege which the defendants had to go aboard the vessel for inspection so that they could later arrange for repairs is not in and of itself sufficient to establish control of the vessel by these defendants.

19. The defendants did not have any authority to instruct the officers and crew not to permit the stevedores, including the plaintiff, to use the boom which it is alleged caused the accident. 999

20. These defendants did not have any authority to instruct the longshoremen, including the plaintiff, not to use the boom which it is alleged caused the accident.

21. There is no evidence in the case that the
1000 defendants ever received any actual notice from the officers of the ship, or from any one else, before the accident happened that the boom was not in good and sound condition.

22. The fact that the general agent was required by the contract and, therefore, did go on board the vessel from time to time in the performance of services for the United States is not in and of itself sufficient to establish control of the vessel by these defendants.

1001 23. The fact that pursuant to the General Agency Contract these defendants were obligated to and did transmit orders from the United States to the Captain and members of the crew from time to time is not in and of itself sufficient to establish control of the vessel by these defendants.

24. The fact that these defendants were required by the General Agency Contract and, therefore, did give instructions to the Master, officers and crew of the steamship Everagra from time to time is not in and of itself sufficient to establish control of the
1002 vessel by these defendants.

25. The fact that the General Agency Contract required the defendants to perform for the United States all of the services mentioned therein and that the defendants performed those services is not in and of itself sufficient to establish control of the vessel by these defendants.

26. At the end of the voyage immediately preceding the happening of the accident on January

27th, 1944, the repairs required on the Everagra amounted to more than $10,000. Therefore, under the terms of the General Agency Agreement and the orders and regulations issued pursuant thereto the matter of arranging for all repairs on the vessel, while the vessel was in New York subsequent to said voyage and up to and including the time of the accident, was reserved by the United States to itself and these defendants did not have any duty to arrange for any repairs at said time. 1003

(The jury retired to deliberate on a verdict at 1:22 P.M.) 1004

(At 3:20 P.M.) The Court: I am sending up the general agency contract, Exhibit No. 1, and Exhibit 8, as requested.

(A paper was pasted over Article 8, Exhibit 1.)

(Sealed verdict ordered by the Court at five o'clock.)

Tuesday, June 12, 1945.

(Sidney Schiffman, Esq., appeared for Mr. Fisch on the verdict.) 1005

VERDICT

The Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: Yes, your Honor.

(Sealed verdict handed to the Court, and opened.)

Motion to Set Aside Verdict Denied.

The Clerk: Ladies and gentlemen of the jury,
1006 hearken to your verdict as it stands recorded. You say you find a verdict in favor of the plaintiff in the sum of $12,000. Verdict signed by all jurors. Is that unanimous, Mr. Foreman? It is a unanimous verdict?

The Foreman: Unanimous.

The Clerk: So say you all.

Mr. Parmer: I move to set aside the verdict on all the exceptions taken during the trial and on all the grounds set forth in Section 549 of the Civil Practice Act, except inadequacy.

1007 The Court: I am going to deny the motion to dismiss the complaint on which I reserved decision during the trial. I am going to deny your motion to set aside the verdict and give you 30 and 60 days, with appropriate exceptions.

Mr. Parmer: Thank you.

1008

Plaintiff's Exhibit 1.

GAA 4-4-42 Contract WSA—5558

SERVICE AGREEMENT FOR VESSELS OF WHICH THE WAR SHIPPING ADMINISTRATION IS OWNER OR OWNER PRO HAC VICE

THIS AGREEMENT, made as of March 1, 1943 between the UNITED STATES OF AMERICA (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and Gerda Eckert and Thor Eckert, co-partners, doing business under the firm name and style of Thor Eckert and Company, with an office at 19 Rector Street, New York, New York (herein called the "General Agent").

WITNESSETH:

That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

ARTICLE 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to

and accepted by the General Agent for that pur-
1012 pose.

ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence
1013 of such orders, the General Agent shall follow reasonable commercial practices;

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agent;

(c) Equip, victual, supply and maintain the
1014 vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with re-

spect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder. 1015 1016

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primage charges, dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall 1017

be used in all cases as soon as practicable after
1018 receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substan-
1019 tially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

ARTICLE 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be per-
1020 formed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable, and, where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States: 1021 1022

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or any interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof. 1023

ARTICLE 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any Service or to furnish any

stores, supplies, equipment, provisions, materials,
1024 or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which,
1025 in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

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ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable

previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. 1027 1028

ARTICLE 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States be reimbursable under Article 7 hereof. 1029

Plaintiff's Exhibit 1.

ARTICLE 7. The United States shall reimburse
1030 the General Agent at stated intervals determined, by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses here-
1031 under) and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection
1032 with the vessels hereunder, including, without limitation; all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss or personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any payments made by the General Agent to a pension

fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive. 1033 1034

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in this ARTICLE 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe. 1035

ARTICLE 9. In the event of general average involving vessels assigned to the General Agent under this Agreement, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements

accounts, documents and data required in the ad-
1036 justment, statement and settlement of the general average. Reasonable compensation for and general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

ARTICLE 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other ves-
1037 sels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

ARTICLE 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty
1038 (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

Plaintiff's Exhibit 1.

ARTICLE 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect of any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

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ARTICLE 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for ap-

proval as to employment. Unless and until such
1042 agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation which may be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an
1043 interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General
1044 Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly,

of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise. 1045

ARTICLE 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. 1046 1047

ARTICLE 15. The United States shall, when it may legally do so, have the advantage of any existing or future contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

Plaintiff's Exhibit 1.

ARTICLE 16. (a) The United States shall in-
1048 demnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims
1049 and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any
1050 error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States or, in the absence of such standard or approved form, under usual commercial practice. 1051

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities. 1052

ARTICLE 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and re- 1053

sponsible employees, or upon the instructions and
1054 directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

ARTICLE 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable
1055 hereunder the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate against any citizen of the United States on the ground of race, creed, color or national origin.

ARTICLE 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his
1056 use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

ARTICLE 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called Bareboat Charter Agreements relating to the as-

signment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such Exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates. 1057

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities. 1058

ARTICLE 21. This agreement supersedes and takes the place of Contract No. WSA 4440 which was executed in error by Thor Eckert and Company as a corporation, the corporation formerly known as Thor Eckert & Co. Inc. having been legally dissolved on October 15, 1941, and the undersigned officers of said corporation at the time of its dissolution do hereby consent to the cancellation and rescission of said Contract WSA 4440 as of the time of its execution. 1059

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

Plaintiff's Exhibit 1.

UNITED STATES OF AMERICA

1060

By: E. S. LAND, ADMINISTRATOR
WAR SHIPPING ADMINISTRATION

By: PERCY CHUBB
TMT For the Administrator

THOR ECKERT AND COMPANY

By: GERDA ECKERT
Partner

1061 By: THOR ECKERT
Partner

THOR ECKERT & CO. INC. (Dissolved)

By: GERDA ECKERT
President

H. C. WINSCH
Secretary

WITNESS:

H. C. WINSCH

1062 H. C. WINSCH

(SEAL)

Approved as to form:

FRANK J. ZITO
Assistant General Counsel
War Shipping Administration

Plaintiff's Exhibit 1.

EXHIBIT "A" TO CONTRACT WSA

1063

Vessel	Date Allocation Approved	Date of Delivery	Cancellation Date of Previous Bare-Boat Charter or Preference Agreement, or both	Date of Redelivery
SS Kegums	3/1/43		Not Applicable	
SS Everâgra	5/27/43		"	

I, HAROLD C. WINSCH, certify that I am the duly chosen, qualified, and acting Secretary of Thor Eckert & Company, Inc. a party to this Agreement, 1064
and, as such, I am the custodian of its official records and the minute books of its governing body; that Gerda Eckert who signed this Agreement on behalf of said corporation, was then the duly qualified President of said corporation; that said officer affixed his manual signature to said Agreement in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said Agreement is within the scope of the corporate and lawful powers of this corporation.

1065

HAROLD C. WINSCH
Secretary

(SEAL)

Plaintiff's Exhibit 1.

ACKNOWLEDGMENT

1066

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

BE IT KNOWN, That on this 20th day of August, 1943, before me personally came Gerda Eckert and Thor Eckert to me known to be the person described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my
1067 hand and seal this 20th day of August, A. D. 1943.

(SEAL)

ROSE C. CINGOTTA
Notary Public, Bronx County
Bronx Co. Clk. No. 48, Reg. No. 24C5
Certificates Filed in
N. Y. Co. Clk. No. 145, Reg. No. 94C5
Commission Expires March 30, 1945

1068

Plaintiff's Exhibits 2, 3, 4 and 5.

Medical exhibits—omitted because not necessary for a determination of the appeal. 1069

Plaintiff's Exhibit 6.

Collection of orders and regulations of the War Shipping Administration—omitted pursuant to stipulation and order providing that originals or copies may be presented at the argument of the appeal.

1070

Plaintiff's Exhibit 7.

Book containing compilation of certain standard contract forms of War Shipping Administration—omitted pursuant to stipulation and order providing that original or copies may be presented at the argument of the appeal.

1071

Plaintiff's Exhibit 8.

WAR SHIPPING ADMINISTRATION

1072

New York, N. Y.

To: District and Local Managers, Maintenance and Repair Division; General Agents under Service Agreements with the War Shipping Administration; and Repair Contractors.

SUBJECT: MAINTENANCE AND REPAIR REGULATIONS No. 1 (REVISED)

Maintenance and Repair Order No. 1, dated
1073 May 13, 1942, is hereby cancelled and repairs to vessels owned by or under bareboat charter to and operated for the account of the United States represented by the War Shipping Administration are to be made in accordance with Maintenance and Repair Regulations No. 1 (Revised) and the Service Agreements under which the vessels may be operated.

R. T. LEMON
Executive Manager
Maintenance and Repair Division

1074 August 20, 1942.

WAR SHIPPING ADMINISTRATION

New York, N. Y.

MAINTENANCE AND REPAIR REGULATIONS
NO. 1 (REVISED)

Plaintiff's Exhibit 8.

To: District and Local Managers, Maintenance and Repair Division; General Agents under Service Agreements with the War Shipping Administration; and Repair Contractors. 1075

SUBJECT: Maintenance and repair of vessels, owned by, or under bareboat charter to, and operated for account of the United States, represented by the War Shipping Administration.

1. Organization and Functions of Maintenance and Repair Division 1076

The War Shipping Administration has established, under the supervision of the Assistant Deputy Administrator for Ship Operations, a Maintenance and Repair Division, the Executive Office of which, is located in New York City. Branch offices have been established in the principal repair ports of the United States.

The maintenance and repair of all vessels owned by, or under bareboat charter to, and operated for account of the United States, represented by the War Shipping Administration, are under the direction of the Executive Manager, Maintenance and Repair Division, who will exercise full authority and control over all ship repairs and maintenance in which the War Shipping Administration may be concerned, all subject to the control of the Administrator and the Assistant Deputy Administrator for Ship Operations and outstanding delegations of authority, and, in collaboration with the Army, Navy and other Government Departments, will supervise conversions and the arming and degaussing of merchant vessels. 1077

Plaintiff's Exhibit 8.

Each District (as defined in Administrative Orders No. 14 and supplements thereto) will have a District Manager who shall be responsible to the Executive Manager for all ship repairs and maintenance in that District. The Atlantic Coast District Headquarters are located at 45 Broadway, New York, N. Y.; the Gulf Coast District Headquarters are located at the Federal Office Building, New Orleans, Louisiana; and the Pacific Coast District Headquarters are located at 200 Bush Street, San Francisco, California.

There are located at the principal repair ports in the United States, Local Managers or Principal Surveyors, who will cooperate with General Agents in arranging for surveys and inspections and will supervise repair operations in such ports.

2. Repairs to be Ordered by General Agents

In instances where vessels owned by, or under bareboat charter to, the United States and assigned to General Agents under Service Agreements with the War Shipping Administration, require repairs (other than structural changes, arming, degaussing, defensing and installation of convoy operating measures) involving the expenditure of not more than $10,000.00 in respect to any one voyage, the General Agents shall arrange for and order the performance of such repairs without prior written approval of the Local Manager, Maintenance and Repair Division. However, General Agents shall promptly notify, and obtain written approval from, the Local Manager, Maintenance and Repair Division whenever it becomes apparent that actual expenditures will exceed the prescribed limitation of $10,000.00.

Plaintiff's Exhibit 8.

Subject to the foregoing, General Agents shall: 1081

(a) Determine the repairs necessary;

(b) Arrange with the Coordinator for Ship Repairs and Conversion for designation of the shipyards which are to perform the work;

(c) Arrange with the Local Manager for drydocking and other surveys, and for inspectors to view the work when the cost of repairs may exceed the prescribed limit;

(d) Prepare and submit specifications in sufficient detail to describe fully the work to be performed, forwarding a copy to the Local Manager. Specifications must show the classification of the work, such as hull, engine, Steward's Department, insurance and improvements. 1082

(e) Place in hand and award contracts for repairs.

(f) Supervise to completion, irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and Navigation, and approved changes and improvements; 1083

(g) Obtain completion certificates, signed by a representative of the General Agent, the Master or Chief Officer, and Chief Engineer, showing that the repairs have been completed.

Plaintiff's Exhibit 8.

General Agents are to award the repairs subject
1084 to the terms of the current basic (master) contract in effect between the contractor and the War Shipping Administration, or, in the absence of a holder of a basic contract for such repairs as required, the General Agent shall award the repairs on a cost plus fixed fee basis, provided the fixed fee does not exceed seven per cent of the cost, based on an estimate made by the general agent before work commences, and the form of contract conforms, as far as practicable, to standard forms of contract approved by the Administrator.

1085 General Agents shall make no structural changes in the vessel, and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance, first, securing the written approval of the Local Manager, Maintenance and Repair Division.

The Payments for all repairs awarded by the General Agents in accordance with this order are to be made by them directly to the repair contractors and charges therefor should be included in the voyage accounts prescribed in Fiscal Regulations No. 1.

1086 3. Repairs to be Ordered by the Maintenance and Repair Division

Specifications are to be prepared, and contracts awarded, by the Maintenance and Repair Division, in accordance with basic (Master) contracts, or subject to the terms of a basic contract to be executed by the contractor by whom the repairs are to be made, in all instances involving the following categories:

Plaintiff's Exhibit 8.

(a) Repairs to vessels owned by, or under bareboat charter to, the United States and assigned to General Agents under Service Agreements with the War Shipping Administration, involving the expenditure of more than $10,000.00 in respect to any one voyage, except in an instance where the General Agents arrange for and order the performance of such repairs on the basis of estimates indicating that their cost will not exceed $10,000.00 and it later develops that the actual expenditures exceed that limitation. 1087

(b) Special service requirements, arming, degaussing, and installation of defense features, 1088

(c) Repairs to vessels owned by, or under bareboat charter to, the United States but not assigned to a General Agent under a Service Agreement, and

(d) Repairs to vessels under time charter to the United States when such repairs are determined to have resulted from a risk assumed by the War Shipping Administration under such time charter.

1089

The payments for all repairs awarded by the Division of Maintenance and Repair, in accordance with this order, are to be made by the War Shipping Administration directly to the repair contractor upon receipt of properly executed public vouchers.

R. T. LEMON
Executive Manager
Maintenance and Repair Division

AUGUST 20, 1942.

Defendant's Exhibits A, B, C and D.

1090 Photographs—omitted pursuant to stipulation and order providing that originals or copies may be presented at the argument of the appeal.

Defendant's Exhibit E.

Model of ship—omitted pursuant to stipulation and order providing that original may be presented at the argument of the appeal.

1091

Defendant's Exhibit F.

Photograph—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal.

Defendant's Exhibits G, H, I and J.

1092 Medical exhibits—omitted because not necessary for the determination of the appeal.

Defendant's Exhibits K-1, K-2 and K-3.

Pieces of wood—omitted pursuant to stipulation and order providing that originals may be presented at the argument of the appeal.

Defendant's Exhibit L.

Certificate—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal. 1093

Defendant's Exhibit M.

Maintenance and Repair Regulation (revision of Dec. 15, 1944, effective Jan. 15, 1945)—omitted because withdrawn at trial.

1094

Defendant's Exhibits N, O, P and Q.

Photographs—omitted pursuant to stipulation and order providing that originals or copies may be presented at the argument of the appeal.

Defendant's Exhibits R and S.

Envelopes and pieces of wood enclosed—omitted pursuant to stipulation and order providing that originals may be presented at the argument of the appeal. 1095

Defendant's Exhibit T.

Stevedoring contract between War Shipping Administration and the Jarka Corporation—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal.

Defendant's Exhibit U.

1096 Letter—omitted pursuant to stipulation and order providing that original or copy may be presented at the argument of the appeal.

Defendant's Exhibits V-1 and V-2.

Pieces of wood—omitted pursuant to stipulation and order providing that originals may be presented at the argument of the appeal.

1097

Statement That the Case Contains All the Evidence.

The foregoing case contains all the evidence taken and proceedings had on the trial of the above-entitled action together with the objections and exceptions of both parties, which are material on this appeal, with the exception of exhibits not necessary for a determination of this appeal and certain other exhibits, which, pursuant to stipulation and order, will be presented at the argument of the appeal.

1098

Stipulation as to Exhibits.

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

PETER CALDAROLA,

Plaintiff-Respondent,

—against—

GERDA ECKERT and THOR ECKERT, JR., partners, doing business under the firm name of THOR ECKERT & COMPANY,

Defendants-Appellants.

IT IS HEREBY STIPULATED that the originals or copies of the following exhibits may be presented to the Court on the argument of this appeal:

Plaintiff's Exhibit 6: Collection of orders and regulations of the War Shipping Administration, together with any other written orders and regulations which, pursuant to the stipulation at the trial, may be considered as in evidence in this case.

Plaintiff's Exhibit 7: Book containing compilation of certain standard contract forms.

Defendant's Exhibits A, B, C, D, F, N, O, P and Q: Photographs.

Defendant's Exhibit L: Certificate.

Defendant's Exhibit T: Stevedoring contract between the War Shipping Administration and The Jarka Corporation.

Defendant's Exhibit U: Letter.

Stipulation as to Exhibits.

1102 AND IT IS FURTHER STIPULATED that the originals of the following may be presented to the Court on the argument of this appeal:

Defendant's Exhibits K1, K2 and K3: Pieces of wood.

Defendant's Exhibits R and S: Envelopes and pieces of wood enclosed.

Defendant's Exhibit E: Ship model.

Defendant's Exhibits V1 and V2: Pieces of wood.

1103 AND IT IS FURTHER STIPULATED that copies of the foregoing exhibits need not be printed nor reproduced in any manner in the case on appeal herein.

Dated, New York, October 17, 1945.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Appellants.

A. M. FISCH,
Attorney for Plaintiff-Respondent.

So Ordered
F.M.

1104

Affidavit of No Opinion.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*: 1105

RAYMOND PARMER, being duly sworn, deposes and says:

I am a member of the firm of Kirlin, Campbell, Hickox & Keating, attorneys for the defendants-appellants in this action and I am familiar with all the proceedings had herein.

In deciding the foregoing case, Honorable James B. M. McNally, Trial Justice, rendered no opinion in writing. 1106

RAYMOND PARMER.

Sworn to before me this
6th day of December, 1945.

EDMUND E. KELLY, Notary Public
N. Y. Co. Clk's No. 254, Reg. No. 440-K-6
Kings Co. Clk's No. 184, Reg. No. 332-K-6
Commission expires March 30, 1946.

1107

Stipulation Settling Case.

IT IS HEREBY STIPULATED that the foregoing case
1108 contains all the evidence given upon the trial of this action together with all the objections and exceptions of both sides taken upon the trial, material on this appeal, with the exception of plaintiff's Exhibits 2, 3, 4 and 5, and defendant's Exhibits G, H, I and J, which are not necessary for a determination of this appeal, defendant's Exhibit M which was withdrawn at the trial and with the further exception of plaintiff's Exhibits 1, 6, 7 and 8, and defendant's Exhibits A, B, C, D, E, F, K-1, K-2, K-3, L, N, O, P, Q, R, S, T, U, V-1 and V-2, which
1109 may be presented at the argument of the appeal pursuant to stipulation and order, and that the foregoing case be settled and ordered filed and annexed to the judgment roll.

Dated, New York, N. Y., December 6, 1945.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Appellants.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Respondent.

1110

Order Settling Case.

On the foregoing stipulation that the above case on appeal contains all the evidence and objections and exceptions of all the parties, material on this appeal, with the exception of certain exhibits as set forth in said stipulation, it is hereby settled and ordered filed.

Dated: New York, N. Y. December 7, 1945.

JAMES B. M. McNALLY,
J. S. C.

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, case and exceptions, judgment appealed from and all the papers used before the Court below and the whole thereof, now on file in the office of the Clerk of The Supreme Court of the State of New York, County of New York. 1111

Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, December 6, 1945. 1112

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Appellants.

ABRAHAM M. FISCH,
Attorney for Plaintiff-Respondent.

Order Filing Record in Appellate Division.

Pursuant to the foregoing stipulation it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department. 1113

Dated, New York, December 7, 1945.

JAMES B. M. MCNALLY,
J. S. C.

Court of Appeals

OF THE STATE OF NEW YORK

PETER CALDAROLA,

Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, Inc.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, Jr., partners doing business under the firm name of THOR ECKERT & CO.,

Defendants-Respondents.

SUPPLEMENTAL ADDITIONAL PAPERS TO THE COURT OF APPEALS

ABRAHAM M. FISCH,
Attorney for Plaintiff-Appellant,
No. 225 Broadway,
Borough of Manhattan,
City of New York.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Attorneys for Defendants-Respondents,
No. 120 Broadway,
Borough of Manhattan,
City of New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 43 NEW CHAMBERS ST., N. Y.

INDEX

	PAGE
Notice of Appeal from Resettled Order.....	1
Order on Motion for Resettlement, Appealed From	3
Waiver of Certification (Court of Appeals)..	7

Notice of Appeal from Resettled Order

Court of Appeals

OF THE STATE OF NEW YORK

PETER CALDAROLA,
Plaintiff-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defendants-Respondents.

Sirs:

PLEASE TAKE NOTICE that the plaintiff Peter Caldarola hereby appeals to the Court of Appeals of the State of New York from a resettled order dated April 5, 1946 and entered in the office of the Clerk of the Supreme Court of the State of New York, Appellate Division, First Department on the 25th day of June, 1946 where by the terms of the said order the Appellate Division ordered and adjudged that the

judgment in favor of the plaintiff and against the defendants above named be in all things reversed upon questions of law and the facts with costs to the defendants and plaintiff's complaint dismissed with costs. Plaintiff Peter Caldarola, also appeals from the judgment entered in the office of the Clerk of the County of New York on the 9th day of April, 1946 which was in favor of the defendants Gerda Eckert and Thor Eckert, Jr., and against the plaintiff in the sum of $866.95. Plaintiff appeals from each and every part of the said order and each and every part of the judgment as well as from the whole thereof.

Dated: New York, June 28, 1946.

Yours, etc.,

ABRAHAM M. FISCH,
Attorney for Plaintiff,
Office & P. O. Address,
225 Broadway,
Borough of Manhattan,
City of New York.

To:

KIRLIN, CAMPBELL, HICKOX & KEATING, ESQS.,
Attorneys for Defendants-Respondents,
120 Broadway,
New York City.

COUNTY CLERK OF THE COUNTY OF NEW YORK.

Order on Motion for Resettlement, Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1946.

Present:

Hon. Francis Martin,
Presiding Justice.
" Alfred H. Townley,
" Edward J. Glennon,
" Joseph M. Callahan,
" David W. Peck,
Justices.

16337

Peter Caldarola,
Respt.,

—against—

Moore-McCormack Lines, Inc.,
Deft.,

impleaded with

Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co.,
Defts.-Applts.

The above named respondent having moved

10 *Order on Motion for Resettlement, Appealed From*

for a resettlement of the order made herein and entered and filed in the office of the Clerk of this Court on the 5th day of April, 1946,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Abraham M. Fisch, in support of said motion, and the affidavit of Raymond Parmer, in opposition thereto, and after hear-
11 ing Mr. Abraham M. Fisch for the motion, and Mr. Raymond Parmer opposed,

It is ordered that said order be and the same hereby is resettled to read as follows:

12

5

Order on Motion for Resettlement, Appealed From 13

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of April, 1946.

Present:

HON. FRANCIS MARTIN,
Presiding Justice.

" ALFRED H. TOWNLEY, 14

" EDWARD J. GLENNON,

" JOSEPH M. CALLAHAN,

" DAVID W. PECK,
Justices.

16337

PETER CALDAROLA,
Respt.,

—against— 15

MOORE-McCORMACK LINES, INC.,
Deft.,

impleaded with

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO.,
Defts.-Appdts.

An appeal having been taken to this Court

16 *Order on Motion for Resettlement.*
Appealed From

by the defendants Gerda Eckert and Thor Eckert, Jr., partners, etc., from the judgment of the Supreme Court, New York County, entered on the 13th day of June, 1945, and said appeal having been argued by Mr. Raymond Parmer, of counsel for the appellants, and by Mr. Abraham M. Fisch, of counsel for the respondent; and due deliberation having been had thereon,

17

IT IS HEREBY ORDERED AND ADJUDGED that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of fact and of law, with costs to the appellants, and the complaint dismissed with costs. (Two of the Justices dissent and vote to affirm.)

D. W. P.

18

Waiver of Certification

(Court of Appeals)

Pursuant to Section 170 of the Civil Practice Act,

It is hereby stipulated that the foregoing consists of true and correct copies of the Notice of Appeal, dated June 28, 1946, the resettled order reversing the judgment in favor of the plaintiff and dismissing the complaint of the plaintiff dated April 5, 1946, all of which are now on file in the office of the Clerk of the County of New York.

Certification of all the foregoing papers is hereby waived.

Dated: New York, N. Y., July 5, 1946.

Abraham M. Fisch,
Attorney for Plaintiff-Appellant.

Kirlin, Campbell, Hickox & Keating,
Attorneys for Defendants-Respondents.

[fol. 406] STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, Leland F. Coss, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Peter Caldarola, Appellant, v. Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert et al., Partners under the Firm Name of Thor Eckert & Co., Respondents, decided by the Court of Appeals on the 23rd day of July, 1946, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as a Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 7th day of September, 1946.

Leland F. Coss, as Reporter of the Court of Appeals of the State of New York. (Seal.)

Attest: (L. S.) John Ludden, Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, John T. Loughran, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that John Ludden is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Leland F. Coss is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Peter Caldarola, Appellant, v. Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert et al., Partners under the Firm Name of Thor Eckert & Co., Respondents, decided by the said Court of Appeals on the 23rd day of July, 1946, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Ap-

peals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of John Ludden, as clerk of said court, appended thereto is the true and genuine signature of said John Ludden, and the signature of Leland F. Coss, as reporter of said court, appended thereto is the true and genuine signature of said Leland F. Coss.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York on the 10th day of September in the year one thousand nine hundred and forty-six.

John T. Loughran, as Chief Judge of the Court of Appeals of the State of New York.

[fol. 407] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1946.

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Joseph M. Callahan, Hon. David W. Peck, Justices.

16337

PETER CALDAROLA, Respt.,

vs.

MOORE-McCORMACK LINES, INC., Deft.,

Impleaded with GERDA ECKERT and THOR ECKERT, JR., Partners Doing Business Under the Firm Name of Thor Eckert & Co., Deft.-Applts.

ORDER ON MOTION FOR RESETTLEMENT

The above named respondents having moved for a resettlement of the order made herein and entered and filed in the office of the Clerk of this Court on the 5th day of April, 1946,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Abraham M. Fisch, in support of said motion, and the affidavit of

Raymond Parmer, in opposition thereto, and after hearing Mr. Abraham M. Fisch for the motion, and Mr. Raymond Parmer opposed,

It is ordered that said order be and the same hereby is resettled to read as follows:

[fol. 408] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of April, 1946.

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Joseph M. Callahan, Hon. David W. Peck, Justices.

16337

PETER CALDAROLA, Respt.,

vs.

MOORE-McCORMACK LINES, INC., Deft.,

Impleaded with GERDA ECKERT and THOR ECKERT, JR., Partners Doing Business Under the Firm Name of Thor Eckert & Co., Defts.-Applts.

An appeal having been taken to this court by the defendants Gerda Eckert and Thor Eckert, Jr., partners, etc., from the judgment of the Supreme Court, New York County, entered on the 13th day of June, 1945, and said appeal having been argued by Mr. Raymond Parmer of counsel for the appellants, and by Mr. Abraham M. Fisch, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, reversed upon questions of fact and of law, with costs to the appellants, and the complaint dismissed with costs. (Two of the Justices dissent and vote to affirm.)

D. W. P.

[fol. 409] APPELLATE DIVISION OF THE SUPREME COURT,
First Judicial Department,
Clerk's Office, County of New York:

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order as

resettled made by said Court upon the appeal in the above entitled action or proceeding, and entered in my office on the 25th day of June, 1946.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 26th day of June, 1946.

George T. Campbell, Clerk. (Seal.)

[fol. 410] [Endorsed:] Supreme Court, Appellate Division, First Department. Peter Caldarola, Respondent, against Moore-McCormack Lines, Inc., et al., Appellants. Order of Resettlement. Abraham M. Fisch, Attorney for respondent, 225 Broadway, Borough of Manhattan, New York City.

[fol. 411] UNREVISED AND UNCORRECTED

NOT FOR PUBLICATION

43—N.Y. Opinion—Vol. 295—7497

PETER CALDAROLA, Appellant,

v.

MOORE-MCCORMACK LINES, INC., Defendant and GERDA ECKERT et al., partners under the firm Name of THOR ECKERT & Co,. Respondents

Decided July 23, 1946

Abraham M. Fisch and Sidney Schiffman for appellant.

Raymond Parmer and Vernon Sims Jones for respondents.

DESMOND, J. Plaintiff, a longshoreman, was injured while working on the deck of a steamship moored at a New York City pier, by reason of the breaking of a cargo boom which was part of the ship's gear and which, the jury held, was defective. Plaintiff was not a member of the ship's crew but was an employee of an outside stevedoring contractor. The vessel was owned by the United States. Plaintiff sued defendants-respondents Eckert, alleging and attempting to prove that those defendants were so much in possession and control of the ship, at the time of the

accident, as to make them responsible to third persons lawfully on board, for injuries caused by unsafe conditions on the ship. The jury found for plaintiff but the Appellate Division reversed upon the facts and law, and dismissed the complaint.

Defendants were not charterers of the vessel nor did they physically operate it. Plaintiff's contention that defendants had a duty to him, to keep the ship in repair, was based on the terms of a "General Agency Contract" made between defendants and the United States and covering this and other ships, plaintiff relying also on certain governmental "Regulations" which supplemented and amplified that contract. By the contract and the regulations defendants were appointed "agents" to manage and conduct the business of "those ships. The Appellate Division held that nothing in the arrangements between defendants and the United States made defendants any more than managers of certain aspects of the ship's "business" and that defendants were not operators of the ship or responsible to third persons for its condition. Accordingly, held the Appellate Division, (270 App. Div. 563, 566) any failure by defendants to perform such duties as were assigned to them by the United States in connection with repairs to the ship, was "strictly non-feasance" for which defendants were answerable to their principal, the United States, but not to plaintiff. The Appellate Division cited

and applied Cullinos V. Goetz (256 N.Y. 287) where Chief Judge Cardozo wrote (p. 290): "Liability in tort is an incident to occupation or control."

We are in full agreement with the Appellate Division's conclusions and the reasons therefor as stated in its opinion. [fol. 412] There would be no occasion for writing this opinion were it not for plaintiff's reliance on the decision of the United States Supreme Court (handed down the day before the argument of the present case in our court) in Hust V. Moore-McCormack Lines, Inc. — U.S.* —). In that case the Supreme Court reversed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who, unlike the present plaintiff, was a

*66 S. Ct. 1218; 90 L. Ed. 1220; F. 90 L. Ed. 663, 666.

seaman. The "General Agency contract" made between the United States and defendant in the Hust case was identical with the contract of the present defendants with the government. But Hust's suit was brought under the "Jones Act" (— U. S. Code, tit. 46, Sec. 688) which gives a seaman a statutory cause of action in negligence against his employer. The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the "General Agent". A concurring opinion by two of the Supreme Court Justices, in the Hust case, goes much further and construes the "General Agency contract" as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party (See S.R.A. v. Minnesota, U.S.F.). We find nothing in this record to prove possession or control of the ship in these defendants Eckert, and so hold with the Appellate Division that whatever his other remedy might be against the United States or anyone else (see the Federal "Suits in Admiralty Act", U.S. Code, tit. 46 Sec. 742), plaintiff has no cause of action against these defendants. We agree with the Appellate Division that Brady v. Roosevelt S. S. C. (317 U.S. 575) is not authority for plaintiff's position here, since in the Brady case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it.

The judgment should be affirmed, with costs.

Lougnran, Ch., J., Lewis, Conway, Thacher and Fuld, JJ., concur: Dye, J., taking no part.

Judgment affirmed.

[fol. 413] [Endorsed:] State of New York, Court of Appeals. Peter Caldarola, Appellant, Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert, et al., Respondents. Opinion. Abraham M. Fisch, Attorney for Appellant, 225 Broadway, Borough of Manhattan, New York City.

[fol. 414] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 23rd day of July—in the year of our Lord one thousand, nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding.

John Ludden, Clerk.

REMITTITUR—July 23, 1946

PETER CALDAROLA, Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant,

and

GERDA-ECKERT, & ANO., Partners, &c., Respondents

Be it remembered, that on the 26th day of April, in the year of our Lord, one thousand nine hundred and forty-six Peter Caldarola, the appellant in this cause, came here unto the Court of Appeals, by Abraham M. Fisch, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, which return was thereafter amended.

And Gerda Eckert, & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Kirlin, Campbell, Hickox & Keating, their attorneys.

[fol. 415] Which said Notice of Appeal and the amended return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Abraham M. Fisch of counsel for the appellant and by Mr. Raymond Parmer, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs. . . .

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the

said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and amended return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 23, 1946.

I hereby certify, that the preceding record contains a correct transcript of the proceeding in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 416] [Endorsed:] Court of Appeals, State of New York. Peter Caldarola, Appellant, against Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert, & ano., Respondents. Remittitur. Abraham M. Fisch, Attorney for Appellant, 225 Broadway, Borough of Manhattan, New York City.

[fol. 417] At a Special Term, Part II of the Supreme Court held in and for the County of New York at the Court House thereof, New York, N. Y., on the 1st day of August 1946.

Present: Honorable Joseph A. Gavagan, Justice.

PETER CALDAROLA, Plaintiff

against

MOORE-MCCORMACK LINES, INC., and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., Defendants.

ORDER ON REMITTITUR OF COURT OF APPEALS, 8618/1944

The plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York, on the 9th day of April 1946 which reversed the judgment for the plaintiff in the total sum of $12,191.10 entered in the office of said Clerk on June 13, 1945 and dismissed the complaint with costs in the sum of $866.95, and the Court of Appeals having, on July 23, 1946, affirmed the said judgment, with costs,

Now on reading and filing the remittitur with Court of Appeals dated July 23, 1946, and on motion of Kirlin, Campbell, Hickox & Keating, Attorneys for Defendants Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., it is

[fol. 418] Ordered that the judgment of the Court of Appeals be and is hereby made the judgment of this Court, and the Clerk of the County of New York is directed to enter judgment affirming the said judgment of the Appellate Division of the Supreme Court for the First Judicial Department, with costs on appeal.

Enter

J. A. G., J. S. C.

[fol. 419] SIRS:

Please take notice that a order, of which the within is a copy, was filed and entered in the office of the clerk of the above named Court, on August 1, 1946.

Yours, &c., Kirlin, Campbell, Kickox & Keating.

[Endorsed:] Supreme Court, County of New York. Peter Caldarola, Plaintiff, against Moore-McCormack Lines, Inc., and Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., defendants. Order on Remittitur of Court of Appeals. Kirlin, Campbell, Hickox & Keating, Attorneys for Defendants, One Twenty Broadway, New York 5, N. Y. Filed 8/1/46. N. Y. Co. Clks. Office, Aug. 7, 1946. Abraham M. Fisch, Attorney for Plaintiff.

[fol. 420] SUPREME COURT, NEW YORK COUNTY

PETER CALDAROLA, Plaintiff,

against

MOORE-MCCORMACK LINES, INC., and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., Defendants.

JUDGMENT OF AFFIRMANCE BY COURT OF APPEALS, 8618/1944

The plaintiff having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York, on the 9th day of April 1946, which reversed the judgment for the plaintiff in the total sum of $12,191.10, entered in the office of said Clerk on June 13, 1945, and dismissed the complaint with costs in the sum of $866.95, and the Court of Appeals having, on July 23, 1946, affirmed the said judgment with costs, and the remittitur of the Court of Appeals having been filed in the office of the Clerk of the County of New York, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court and directing the entry of a judgment of affirmance herein with costs,

Now on motion of Kirlin, Campbell, Hickox & Keating, Attorneys for Defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., it is

Adjudged that the judgment of the Appellate Division of the Supreme Court for the First Judicial Department entered in the office of the Clerk of the County of New York on June 13, 1945, which reversed the judgment for the [fol. 421] plaintiff in the total sum of $12,191.10 entered herein on June 13, 1945, and dismissed the complaint with costs in favor of Defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., in the sum of $866.95, be and is hereby affirmed, and that the said Defendants, Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., of 19 Rector Street, Borough of Manhattan, City of New York, recover of Peter Caldarola, plaintiff, of 1050 67th Street, Borough of Brooklyn, City of New York, the sum of $191.35, costs on appeal as taxed, and that said defendants have execution thereon.

Judgment signed this 7th day of August, 1946. Archibald R. Watson, Clerk.

[fol. 422] [Endorsed:] Supreme Court, New York County. Peter Caldarola, Plaintiff, against Moore-McCormack Lines, Inc., and Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., Defendants. Judgment of Affirmance by Kirlin, Campbell, Hickox & Keating, Attorneys for Gerda Eckert and Thor Eckert, Jr., etc., One Twenty Broadway, New York 5, N. Y. Filed 8/1/46, N. Y. Co. Clks. office. Received Aug. 7, 1946. Abraham M. Fisch, Attorney for Plaintiff.

[fol. 423] SUPREME COURT, NEW YORK COUNTY

PETER CALDAROLA, Plaintiff-Appellant,

against

MOORE-McCORMACK LINES, INC., Defendant, and GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., Defendant-Respondents.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I have compared the foregoing record on appeal to the Court of Appeals, entered and filed in my office on August 1, 1946, remittitur of the Court of Appeals dated July 23, 1946 both entered and filed in my office on August 1, 1946 and the opinion of the Court of Appeals filed Sept. 13, 1946 the order of Supreme Court dated August 1, 1946 and entered and filed in my office on August 1, 1946, making the order and judgment of the Court of Appeals the order and judgment of the Supreme Court and the judgment entered on remittitur of the Court of Appeals filed and entered on August 7, 1946 and that each of the foregoing is a true and correct transcript therefrom and the whole of such original.

In witness whereof, I have hereunto set my hand and affixed my official seal this 16th day of September, 1946.

Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County. (Seal.)

[fol. 424] [Endorsed:] Supreme Court, New York County. Peter Caldarola, Plaintiff-Appellant, against Moore-McCormack Lines, Inc., Defendant, and Gerda Eckert, et al., Defendant-Respondents. Certification of Record. Abraham M. Fisch, Attorney for plaintiff-appellant, 225 Broadway, Borough of Manhattan, New York City.

[fol. 425] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 625

ORDER ALLOWING CERTIORARI—Filed November 12, 1946

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 525

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner,
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 45 NEW CHAMBERS ST., N. Y.

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

Statement of the Matter Involved 2
Basis for Jurisdiction 3
Questions Presented 3
Opinion of the Courts Below 4
Reasons Relied on for the Allowance of the Writ .. 4

BRIEF IN SUPPORT OF THE PETITION:

POINT I—The decision of the New York Court of Appeals in the case at bar is contrary to the decision of this Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.* decided June 10, 1946 and *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 and is also in conflict with the decision of the Federal Circuit Court of Appeals in New York in the case of *Militano* v. *U. S. A., et al*, decided July 9, 1946 and reported in 1946 A. M. C., p. 1143 8

POINT II—The New York Court of Appeals was in error in holding that the agency agreement in the case of *Brady* v. *Roosevelt Steamship Company, supra*, decided by this Court differs with the agency agreement in the case at bar. It was likewise in error in deciding that the decision in the *Brady* case has no application to the facts in the case at bar 19

INDEX—(Continued)

PAGE

POINT III—The proof in the case at bar showing that the respondents operated and had possession and control of the vessel is stronger than in the cases decided by this Court in *Hust* v. *Moore-McCormack Lines, Inc.* and *Brady* v. *Roosevelt Steamship Company, supra*, and in the case of *Militano* v. *U. S. A., et al*, decided by the Federal Circuit Court of Appeals for the Second Circuit 21

The Defendants and the War Shipping Administration Contemplated Operation of the Vessel by the Defendants 22

The Defendants Were in Custody and Control of the Vessel 25

The Defendants Employed the Ship's Officers and Crew 26

CONCLUSION—It is respectfully submitted that the writ of certiorari prayed for should be granted to the end that this action may be reviewed and determined by this Court; and the order of the New York Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper 33

CASES CITED

PAGE

Brady v. *Roosevelt Steamship Co.*, 317 U. S. 575.....4, 5, 6 18, 20, 21

Hust v. *Moore-McCormack Lines, Inc.*, decided June 10th, 1946.....4, 5, 6, 11, 12, 17, 20, 21

Militano v. *U. S. A., et al*, decided by Circuit Court of Appeals, 2nd Circuit on July 9, 1946.....4, 5, 6, 15, 17, 21

Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Peter Caldarola, a resident of the State of New York, prays for a writ of certiorari to the

Court of Appeals of the State of New York to review its order entered on the 23rd day of July, 1946, a copy of which is annexed to the certified record submitted to this Court. The order of the Court of Appeals affirmed the order of the Appellate Division, which reversed the judgment in favor of the petitioner and against the respondents Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., and dismissed the petitioner's complaint, two of the Justices dissenting, upon questions of fact and law. (See folios 13 to 17 of the Supplemental Additional Papers to the Court of Appeals.) (Note:—Two additional records were submitted to the Court of Appeals, one entitled "Additional Papers to the Court of Appeals", and the other entitled, "Supplemental Additional Papers to the Court of Appeals". It became necessary to file the "Supplemental Additional Papers to the Court of Appeals" because the order of the Appellate Division which originally reversed the judgment of the petitioner and dismissed the complaint, was on questions of law only. This was amended to state that the judgment was reversed and the complaint dismissed on questions of law and fact.) A certified transcript of the record in this case, including the proceedings in the Court of Appeals is furnished herewith in accordance with Rule 38, Paragraph 1 of the rules of this Court.

Statement of the Matter Involved

This case involves the interpretation of the general agency agreement made between the War Shipping Administration and general agents concerning the operation of vessels during the war period. (See Agency Agreement, R. fols. 1009 to 1065, 1075 to 1089 and a book of Orders, Rules and Regulations of War Shipping Administration which are excerpts from Respondents' [Defend-

ants'] Exhibit No. 6, which Orders, Rules and Regulations, are in a separate bound volume.)

Petitioner, a longshoreman, was injured on the 27th day of January, 1944 while working on the deck of the steamship "Everagra", which vessel was owned by the United States of America (R. fols. 59, 141, 65). The accident occurred because a defective cargo boom broke, and which the jury held was defective (R. fol. 69). The petitioner was struck by the boom or by the tackle attached to it.

The cause of action against the respondents relied upon by the petitioner was that the boom which broke and injured him was rotten and defective and it was the duty of the respondents, as general agent, to keep the said boom in a good condition of repair. Petitioner proved that the boom had been in a defective condition for five to ten years prior to the happening of the accident (R. fols. 840, 841). The extent of the defect in the boom was testified to by witness John R. Russo (R. fols. 198, 199) and Vincent Russo (R. fols. 161 to 163).

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 38, Paragraph 5A. Another ground urged for jurisdiction is that the questions involved is of great public importance.

Questions Presented

1. Did the respondents, acting as general agent under the agency agreement with the United States Government, have a sufficient measure of control over the physical operation of the vessel?

2. Did the respondents, acting as general agent under the agency agreement with the United States Government, owe a duty to the petitioner, a longshoreman, to keep the ship's boom in a good condition of repair?

3. Is there any substantial difference between the agency agreement in the case at bar and the one considered by this Court in the case of *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575?

Opinion of the Courts Below

The case at bar was decided by the Court of Appeals on July 23, 1946 and reported in 295 New York 463. *Militano* v. *U. S. A., et al,* was decided by the Circuit Court of Appeals, 2nd Circuit on July 9, 1946 and is reported in 1946 A. M. C., p. 1143. The opinion of the Appellate Division in the case at bar in the court below is reported in 61 New York Supplement, 2nd Series, page 164 and decided on April 5, 1946.

Reasons Relied on for the Allowance of the Writ

The decision by the New York Court of Appeals in the case at bar has created confusion and is in direct conflict with the decision of *Hust* v. *Moore-McCormack Lines, Inc.*, decided by this Court on the 10th day of June, 1946 and reported in 1946 A. M. C., 727.

The decision of the New York Court of Appeals in the case at bar is also in direct conflict with the decision of the Federal Circuit Court of Appeals for the Second Circuit in the case of *Militano* v. *U. S. A., et al,* decided by the Circuit Court of Appeals on the 9th day of July, 1946 and reported in 1946 A. M. C. 1143.

Great confusion has resulted from the decision of

the New York Court of Appeals. In the State of New York, the Federal Circuit Court of Appeals has followed this Court's decision in the *Hust* case, while the State Court of Appeals has refused to do so. We thus have this unfortunate situation. A litigant in the Federal Court in New York State receives one brand of justice, while a litigant in the State Court with an identical cause of action has his complaint dismissed.

The New York Court of Appeals in the case at bar, *supra*, admitted that the agency agreement in the *Hust* case is identical with the agency agreement in the case at bar. In its opinion on page 466, the Court of Appeals stated:

> "The general agency contract made between the United States and defendant in the Hust case was identical with the contract of the present defendants with the government."

The New York Court of Appeals has held that under the agency agreement referred to, a third party who is injured on a vessel through a defect in the ship's equipment, has no cause of action against the agent. This Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.*, *supra* and *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 and the Federal Circuit Court of Appeals in New York State in the case of *Militano* v. *U. S. A., et al*, *supra*, had held a contrary view.

The New York Court of Appeals, by its decision, erroneously held as follows:

1. That the respondents were appointed as agent to manage the business of the ship as distinguished from its physical operation.

2. That the respondents were not the operators

of the ship.

3. That the respondents were not in possession and control of the vessel.

4. That the respondents were not responsible to third persons for the condition of the vessel.

5. That the agency agreement in the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 differs materially from the agreement in the case at bar and for that reason, the New York Court of Appeals held the *Brady* decision has no application to the facts in this case.

Under the various points we propose to set out portions of the opinion of the New York Court of Appeals in the case at bar and then to quote portions of the prevailing and concurring opinion of this Court in the case of *Hust* v. *Moore-McCormack Lines, Inc.*, holding a contrary view. We also propose to set forth the opinion of the Federal Circuit Court of Appeals for the Second Circuit in the case of *Militano* v. *U. S. A., et al, supra*, which followed the reasoning of this Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.* and *Brady* v. *Roosevelt Steamship Co., supra*. The decision of the New York Court of Appeals is in direct conflict with the cases decided by this Court and the Circuit Court of Appeals in New York.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals of the State of New York requiring the said Court to certify and send up to this Court on a date to be designated a full and complete transcript of the record and of all proceedings in the Court of Appeals had in this action to the end that this action may be reviewed and determ-

ined by this Court; and the order of the Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

PETER CALDAROLA,

By ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner.

Dated: New York, New York,
October 10, 1946.

Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),

Respondents.

BRIEF IN SUPPORT OF THE PETITION.

POINT I

The decision of the New York Court of Appeals in the case at bar is contrary to the decision of this Court in the cases of Hust v. Moore-McCormack Lines, Inc. decided June 10, 1946 and Brady v. Roosevelt Steamship Co., 317 U. S. 575 and is also in conflict with the decision of the Federal Circuit Court of Appeals in New York in the case of Militano v. U. S. A., et al, decided July 9, 1946 and reported in 1946 A. M. C., p. 1143.

In the case at bar, the New York Court of Appeals,

in its decision which is reported in Volume 295, page 463, the Court by Desmond, *J.* stated:

> "Plaintiff, a longshoreman, was injured while working on the deck of a steamship moored at a New York City pier, by reason of the breaking of a defective cargo boom which is part of the ship's gear and which, the jury held was defective. Plaintiff was not a member of the ship's crew, but was an employee of an outside stevedoring contractor. The vessel was owned by the United States. Plaintiff sued defendants-respondents Eckert, alleging and attempting to prove that those defendants were so much in possession and control of the ship, at the time of the accident, as to make them responsible to third persons lawfully on board for injuries caused by unsafe conditions of the ship. The jury found for plaintiff but the Appellate Division reversed upon the facts and law and dismissed the complaint * * *
>
> That the defendants were not the operators of the ship or responsible to third persons for its condition * * *

Judge Desmond, on page 466, stated:

> "We are in full agreement with the Appellate Division's conclusions and the reasons therefor as stated in its opinion. There would be no occasion for writing this opinion were it not for plaintiff's reliance on the decision of the United States Supreme Court (handed down the day before the argument of the present case in our court) in *Hust* v. *Moore-McCormack Lines, Inc.*, ... U. S. ....). In that case the Supreme Court re-

versed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who, unlike the present plaintiff, was a seaman. The 'General Agency' contract made between the United States and defendant in the *Hust* case was identical with the contract of the present defendants with the government. But Hust's suit was brought under the 'Jones Act' (U. S. Code, Tit. 46, Sec. 685) which gives a seaman a statutory cause of action in negligence against his employer. The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action in negligence thereunder against the 'General Agent'. A concurring opinion by two of the Supreme Court Justices, in the *Hust* case, goes much further and construes the 'General Agency' contract as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party (See *S. R. A.* v. *Minnesota*, 90 Law. Ed. Advance Opinions, 663, 666)."

"We find nothing in this record to prove possession or control of the ship of these defendants Eckert and so hold with the Appellate Division that whatever his other remedy might be against the United States or anyone else (see the Federal Suits in Admiralty Act, U. S. Code, Title 46, Section 472), the plaintiff has no cause of action against the defendants . . .

> We agree with the Appellate Division that *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 is not authority for plaintiff's position here, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it.".

This Court in deciding the *Hust* case, stated in the majority and concurring opinion that the duty of keeping the ship in a good condition of repair rested upon the general agent, who is the respondent in this case. The New York Court of Appeals in the case at bar, stated that the general agent was under no duty to third persons to keep the ship's appliances in a good condition of repair. Mr. Justice Rutledge, writing the prevailing opinion, stated:

> "It (the agent) was responsible for keeping the ship in repair and for providing the seamens' supplies."

Mr. Justice Rutledge, in various portions of the prevailing opinion, on more than one occasion, held that the general agent was the operator of the vessel. Mr. Justice Rutledge stated:

> "If this made them technically and temporarily employees of the United States it did not sever altogether their relation to the operating agent."

In another portion of the opinion Mr. Justice Rutledge stated:

> "But it does not follow from the fact that Hust was technically the government employee, that he lost all remedies against the operating agent."

Mr. Justice Douglas writing the concurring opinion in the *Hust* case, with whom Mr. Justice Black agreed, stated on page 748:

> "The agreement moreover specifically provides that the Master is an agent and employee of the United States * * * From this it is argued that the members of the crew were employees of the United States, not of the General Agent or operator.
>
> If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575."
>
> "This problem of liability to third persons is resolved by determining whose enterprise the particular venture was. The fact that the parties say it is the enterprise of one, not the other, is not the decisive. Control in the operation and management of the business, as distinguished from general supervision, is the customary test. I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business. Respondent, The General Agent, had a most substantial measure of control over the operation of the vessels. Its de facto control was no whit less or more whether the Master were called the agent of the owner or its own agent. The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control. Respondent maintains the ves-

sels in the broadest sense and procures a Master and crew. In the *Brady* case the operation was 'to man, equip, victual, supply and operate the vessels.' 317 U. S. p. 576, 1943 A. M. C. 1. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 1941 A.M.C. 1214, 121 F. (2d) 190, 191. But the difference in words between the agreements in those cases and the present one does not, on a view of the entire situation, mark a difference in functions of the private operator. It is, indeed, difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases. Respondent, of course, accounts for its operations to the United States. The United States reimburses it for all of its expenditures, including the wages of the crew. But it is immaterial that the owner provides the entire crew and pays their wages. A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 Fed. 878. So far as this record reveals the operator performed all of the functions which it performed in the *Brady* and *Quinn* cases. There is here no taking over of additional functions by the owner. The arrangement is clothed in different garb. But it is the private operator who manages and controls the physical operation. The powers reserved to the owner were general supervisory powers adequate for the exigencies of the war time conditions which prevailed. But they did not detract from the powers of physical operation granted respondent."

On page 749, the Court stated:

"The fact that we have no more than an agency in form not in substance is borne out by

collateral phases of the undertaking. The compensation of respondent is not to be less than 'the account of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preferences, agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination order permissible thereunder as of March 22, 1942.' Art. 5. The United States agrees to reimburse respondent for 'damages or compensation for death or personal injury or illness' required to be paid. Art. 7. It also agrees to reimburse respondent for payments made by respondent to a pension fund for officers and members of the crew, as well as for 'social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise." Id.

On page 750, the Court stated:

"These provisions all suggest, as the relationship of the parties bears out, that the United States was the underwriter or the financial risks of the venture, the operator continuing as it always had to perform the managerial functions. These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice*. I think that is the true condition which existed here."

"At common law respondent would be the principal, for the business of managing and operating the vessel was its business. It was therefore the

employer and responsible for this personal injury claim."

In the case of *Joseph Militano* v. *United States of America and States Marine Corporation*, decided by the United States Circuit Court of Appeals for the Second Circuit in New York, on July 9, 1946 and reported in 1946 A. M. C., page 1143, Judge Swan, speaking for the Court on page 1144 stated:

> "The appellant was a stevedore in the employ of the United States at the Army Base, Brooklyn, N. Y. On January 19, 1943 he was ordered aboard the S. S. 'Benjamin Hawkins' to operate a winch at hatch No. 5 in loading government-owned cargo. This vessel was a Liberty ship owned by the United States and managed by States Marine Corporation under a general agency contract with the War Shipping Administration; she lay at a pier at the Army Base. While performing his work as winchman the appellant suffered injuries to the fingers of his left hand by reason, as he claims, of defects in the wire cable running from the drum to the gin block. To recover damages for such injuries he filed a libel against the United States and a civil action in tort against States Marine Corporation. A jury trial having been waived in the latter action the two cases were tried together to the Court and resulted in a judgment of dismissal in each."

On page 1146 the Court stated:

> "Militano's injuries were caused by the fact that splinters or 'fish hooks', which had developed in some of the strands of the steel cable leading from the drum of the winc he was operating,

caught in his glove and drew his left hand into the gin block before he could stop the winch. Relying on the *Brady* case, *supra*, he urges that the defective condition of the cable renders liable States Marine as the operating agent of the vessel. The defendant replies that under its agreement with the War Shipping Administration it had no control over the vessel or its crew, was not charged with the duty to repair but merely with the duty to report the condition of the vessel to its principal, the United States, and, if the cable needed to be replaced, it devolved upon the crew to replace it, as spare cables were on board. It argues that the *Brady* case is inapplicable because of differences in the agency agreement there involved and the one under which it was acting. Those differences were pointed out in *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.) where the same form of 'Service Agreement' (GAA 4-4-42) was used as in the case at bar. But such differences cannot be deemed material, we think, in view of *Hust* v. *Moore-McCormack Lines*, *supra*. There it was held that a seaman injured by the negligence of a fellow member of the crew could maintain an action under the Jones Act against an operating agent employed under the same form of service agreement as States Marine had, the majority opinion stating (page 17, pamphlet edition):

> 'The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances enough to deprive seamen of that remedy.'" —

On page 1147, the Court stated:

> "The concurring opinion of Justices Douglas and Black (page 3, pamphlet edition) clearly state their view that the difference in words between the standard agreement of the *Brady* case and the service agreement of the *Hust* case does not 'mark a difference in functions of the private operator.' If the agent remains the employer sufficiently to be liable to member of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owned by a landowner to a business visitor. *Grillo* v. *Royal Norwegian Government*, 139 F. 2d 237, 238 (C. C. A. 2); see *Pioneer S. S. Co.* v. *McCann*, 170 Fd. 873, (C. C. A. 6); *Glover* v. *Compagnie Generale Transatlantique*, 103 F. 2d 557, 559 (C. C. A. 5), cert. den. 308 U. S. 550."

The New York Court of Appeals in the case at bar in affirming the Appellate Division's ruling that the general agent was not liable to third persons for any defect of the vessel, refused to follow the decision of this Court in the *Hust* case because it was claimed the *Hust* case involved the Jones Act. The case of *Militano* v. *U. S. A., et al.*, decided by the New York Federal Circuit Court of Appeals in New York in July, 1946, *supra*, had a state of facts similar to the facts in the case at bar. In the *Militano* case, a longshoreman was injured as in the case at bar. The Federal Circuit Court of Appeals, of New York, in commenting upon this situation, in its opinion at page 1147 stated:

> "If the agent remains the employer sufficiently

> to be liable to members of the crew under the Jones Act we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor."

In the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. page 575, Mr. Justice Douglas, speaking for the Court at page 576 stated:

> "S. S. Unicci was a vessel owned by the United States Maritime Commission and operated for it by respondent under a contract covering this and other vessels. * * * The deceased was a United States customs inspector. While boarding the vesesl on his official duties in July, 1936 a rung of the ladder which he was climbing broke. The injuries which resulted caused his death. At the time of the injury the vessel was docked at a pier in New York City."

On page 580, the Court stated:

> "The liability of an agent for his own negligence has long been embedded in the law. *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, is a recent application of that principle to a situation very close to the present one. But the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567, 'An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.'"

On page 583, the Court stated:

> "Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained. (*cf. Guaranty Trust Co.* v. *Green Cove R. R. Co.*, 139 U. S. 137, 143.) The rights of principal and agent *inter se are not* the measure of the rights of third persons against either of them for their torts."

POINT II

The New York Court of Appeals was in error in holding that the agency agreement in the case of Brady v. Roosevelt Steamship Company, supra, decided by this Court differs with the agency agreement in the case at bar. It was likewise in error in deciding that the decision in the Brady case has no application to the facts in the case at bar.

The New York Court of Appeals in the case at bar, and which is reported in 295 N. Y. 463, stated on page 467 as follows:

> "We agree with the Appellate Division that *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 is not authority for plaintiff's position here, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it."

This Court, both in the prevailing and concurring opinion held that the *Brady* decision was controlling in a matter involving the facts in the case at bar and that there was no substantial difference between the agency agreement in the *Brady* case and the one considered in the *Hust* case, which is identical with the agency agreement in the case at bar.

Mr. Justice Douglas, in writing the concurring opinion in the *Hust* case, with whom Mr. Justice Black agreed, stated on page 748 and 749:

> "In the *Brady* case the operator was to man, equip, victual, supply and operate the vessels. 317 U. S. page 576. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 1941 A. M. C. page 1214. But the difference in words between the agreement in those cases and the present one does not, on a view of the entire situation, mark that difference in functions of a private operation. It is indeed difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases."

Mr. Justice Rutledge, writing for the majority opinion in the *Hust* case, mentioned the *Brady* decision several times. On page 732, he stated:

> "It is around these questions and the effect for determining them of various authorities, particularly *Brady* v. *Roosevelt*, 317 U. S. 575 that the controversy is revolved in the State Courts and here."

POINT III

The proof in the case at bar showing that the respondents operated and had possession and control of the vessel is stronger than in the cases decided by this Court in Hust v. Moore-McCormack Lines, Inc. and Brady v. Roosevelt Steamship Company, supra, and in the case of Militano v. U. S. A., et al, decided by the Federal Circuit Court of Appeals for the Second Circuit.

Some of the proof in the case at bar relating to operation and control was not offered in evidence in the *Hust*, *Brady* and *Militano* cases *supra*. In addition to the agency agreement marked Plaintiff's Exhibit 1, which appears at Record, folios 1009 to 1089 and the rules and regulations issued by the War Shipping Administration after the General Agency agreement, Exhibit 1, had been entered into, which is marked Plaintiff's Exhibit 8, R. folios 1072 to 1089, there was offered in evidence Defendant's Exhibit 6, which is a book containing photostatic copies of orders and regulations issued by the War Shipping Administration and which will be submitted to this Court, together with the petition. In the *Hust* and *Militano* cases, *supra*, this Court and the Circuit Court of Appeals for the Second Circuit correctly held that under the agency agreement, the general agent was in possession and control of the vessel and operated the same. In neither case was the book containing photostatic copies of orders and regulations issued by the War Shipping Administration and marked Defendant's Exhibit 6, offered in evidence. These orders and regulations strengthen the claim that the general agent was in possession and in control of the vessel and physically operated the same.

At the outset, counsel desires to state that not a single order, direction or request was ever made by the United States Government or the War Shipping Administration directly to any officer or member of the crew of any vessel operated under the general agency agreement. The general agent was in direct contact with the officers and crew, gave them their instructions and told them what to do.

Reading the general agency agreement and the rules and regulations issued by the War Shipping Administration to the respondents in the case at bar, the conclusion is irresistable that the respondents were the operators of the vessel and in possession and control of the same.

The Defendants and the War Shipping Administration Contemplated Operation of the Vessel by the Defendants

Plaintiff's Exhibit 1, folios 1009 to 1089 and the rules and regulations issued by the War Shipping Administration, after Plaintiff's Exhibit 1 had been entered into, which is marked Plaintiff's Exhibit 8, folios 1072 to 1089 and Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by W. S. A. and which will be submitted to this Court, must be read in their entirety to appreciate what the parties intended by the agency agreement and the rules and regulations mentioned.

In Article 16 of the agency agreement, folio 1048, it is provided:

> "The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands * * * for injury to persons or property *arising out of or in*

any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder." (Italics ours.)

On page 74 of the Defendants' Exhibit 6, the following notation appears:

"WAR SHIPPING ADMINISTRATION

New York, New York

December 4, 1943

To: General Agents under Service Agreements with the W. S. A.

Subject: Maintenance and Repair Regulations No. 3.

Maintenance and Repair Regulations No. 1, Revised—Supplement No. 1.

In connection with repairs on vessels operated by your Company for account of War Shipping Administration, we are enclosing herewith, for your information and guidance, one copy of Maintenance and Repair Regulations, No. 1, Revised ——" (Italics ours.)

It will be noted that both the War Shipping Administration and the defendants assumed that the vessel was operated by the defendants; otherwise the War Shipping Administration would not have stated:

"In connection with repairs on vessels operated by your company. * * *"

Under date of May 31, 1943, the War Shipping Ad-

ministration issued Regulations No. 59 which appears on page 33 as follows:

> "Therefore, General Agents of the War Shipping Administration are hereby instructed to include in the Marine Index Bureau *all vessels assigned and delivered for operation under General Agency Agreement, as of May* 1, 1943." (Italics ours.)

On page 36 of Defendants' Exhibit 6, Regulations No. 65, it is provided:

> "General Agents are directed that when carrying cargo, cargo oil other than fuel oil, or fresh water in the forward deep tanks of Liberty vessels, the dump valves are to be blanked off."

Under date of October 8, 1942, appearing in Directive No. 1 on page 28 of Defendants' Exhibit 6, the following appears:

"WAR SHIPPING ADMINISTRATION

Washington

October 8, 1942

DIRECTIVE No. 1

To All General Agents and Agents of Vessels Owned by or Chartered to the War Shipping Administration

A frequent and most serious criticism of the American merchant marine has been the lack of discipline aboard ship, both at sea and in foreign ports. The War Shipping Administration is alarm-

ed that these conditions continue in the face of the present war situation. Lack of discipline and order aboard ship is intolerable. It cannot be allowed to continue.

The deterioration of the authority of the Master and licensed officers is the principal cause for the breakdown in discipline. It is essential that this authority be restored immediately and maintained.

All Masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration subsequent to the commitment of the violation." (Italics ours.)

It will be noted that in matters of discipline aboard vessels, the general agent's attention was called for action to be taken. The statement in the Directive:

'All masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration * * *."

corroborates our claim that the general agent was the operator of the vessel.

The Defendants Were in Custody and Control of the Vessel.

The War Shipping Administration recognized the fact that under the general agency agreement and the regulations issued thereunder, the general agent was to be in custody and control of the vessel. At folio 1039, Article 12, provides:

"In case of termination of this agreement,

whether upon expiration of the stated period hereof or otherwise, *all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this agreement, shall be immediately turned over to the United States.*" (Italics ours.)

At folio 1037, Article 11 (g) provides:

"The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice."

Apparently both the United States and the defendants, as general agent, were of the opinion that the vessel under the agency agreement was under the control of the agent. Otherwise, the statement would not have been made in Article 11 that "The United States shall have the right to terminate this Agreement * * * and to assume control forthwith of * * * all said vessels."

The Defendants Employed the Ship's Officers and Crew

Under date of October 8, 1942, Directive No. 1 issued by the War Shipping Administration to general agent, and which appears on page 28 of the Defendants' Exhibit 6, the following is stated:

"You are instructed to place a copy of this communication, together with a copy of this letter, in the hands of all Masters and officers *in your employ.*" (Italics ours.)

Under date of June 22, 1942, the War Shipping Administration issued Operations Regulation No. 4, and which appears on page 67 of the Defendants' Exhibit 6 as follows:

> "Effective immediately, General Agents shall assign to each new vessel under construction and allocated to them by War Shipping Administration, a Master, Chief Mate, Chief Engineer and First Assistant Engineer, approximately thirty (30) days prior to the completion and delivery date."

We understand the word "assign" to mean "hire". This Operations Regulation No. 4 must be deemed to have modified the original agreement marked Plaintiff's Exhibit 1.

Article 1 of the Agency Agreement, folio 1010 provides:

> "The United States appoints the General Age ' • • • to manage and conduct the business of vessels assigned to it by the United States from time to time."

Article 2, folios 1011, provides:

> "*The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations.*" (Italics ours.)

Article 3 (a), folio 1012 provides:

> "Maintain the vessels in such trade or service as the United States may direct."

Article 3 (b), folio 1013 provides:

"Collect all moneys due to the United States under this Agreement and deposit, remit, or disburse the same."

Article 3 (c), folio 1013 provides:

"Equip, victual, supply and maintain the vessels."

Article 3 (d), folio 1014 provides:

"The General Agent shall procure the Master of the vessels, operated hereunder, subject to the approval of the United States. * * * The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel."

Article 3 (e), folio 1016 provides:

"Issue or cause to be issued to shippers customary freight contracts and Bills of Lading."

Article 4 (a) [illegible]s 1023 and 1024 provides:

"The General Agent * * * shall keep its books, records and accounts relating to the management, operation, conduct of the business and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States."

Article 7, folios 1030 and 1031 provides:

"The United States shall reimburse the Gen-

eral Agent at stated intervals determined by the United States for all expenditures * * * *and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder* * *. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, * * * damages or compensation for death, or personal injury or illness, and insurance premiums, required to be paid by law." (Italics ours.)

Article 14 relates to maintenance, inspections and repairs and is the most important article in the agreement. It appears at folios 1045 and 1046 and provides as follows:

"The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering, hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satis-

> fy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable."

Plaintiff's Exhibit 8 (fols. 1075 to 1089) is a supplement to Plaintiff's Exhibit 1 (fols. 1009 to 1059) and shows that the agent had a substantial measure of control over the vessel. Section 2, subdivision (f) folio 1083 provides:

> "(f) Supervise to completion, irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Social and Bureau of Marine Inspection and Navigation, and approved changes and improvements."

Under date of June 1, 1943, the War Shipping Administration issued Operations Regulation No. 48, which will be found on page 12 of the Defendants' Exhibit 6, which reads as follows:

> "Effective immediately, General Agents are directed to instruct Masters that stores, supplies and equipment are to be ordered through the vessels' port agents."

Under date of January 2, 1943, the War Shipping Administration issued Operations Regulation No. 30, which will be found on page 13 of the Defendants' Exhibit 6, which reads as follows:

> "General Agents . . . are instructed to notify the Masters of such vessels to bolt down securely deep tank covers even when the deep tanks are used for carrying dry cargo."

Under date of February 16, 1943, the War Shipping Administration issued Operations Regulation No. 42, which will be found on page 15 of the Defendants' Exhibit 6, which provides:

> "In the interest of safety of the ships' personnel and the morale of crews, Agents and General Agents of the War Shipping Administration vessels are, therefore, directed to instruct the Master and Chief Engineer aboard each vessel to ascertain prior to the proceeding to sea, the condition of the floor plates in the engine and fire rooms of their vessels."

Under date of February 16, 1943, the War Shipping Administration issued Operations Regulation No. 43, which will be found on page 16 of the Defendants' Exhibit, which provides:

> "Agents and General Agents of the War Shipping Administration are directed to instruct Masters that wherever practicable water shall be utilized for ballast purposes in lieu of fuel oil."

Under date of March 10, 1943, the War Shipping Administration issued Operations Regulation No. 50, which will be found on page 18 of the Defendants' Exhibit 6, which reads as follows:

> "All agents and general agents are therefore directed to caution masters and crews of vessels calling at ports in foreign countries to discontinue payments in Dollar currency, etc."

Under date of November 2, 1943, the War Shipping

Administration issued Operations Regulation No. 75, which will be found on page 37 of the Defendants' Exhibit 6, which reads as follows:

> "General Agents are directed to issue the following instructions to Masters of vesesls owned by and under bareboat charter to the War Shipping Administration."

Under date of December 4, 1943, the War Shipping Administration issued Operations Regulation No. 81, which will be found on page 50 of the Defendants' Exhibit 6, which provides:

> "Agents and general agents of the War Shipping Administration are directed to instruct masters to inform Armed Guard Officers as to the time and place of convoy conferences in sufficient time to accompany the Masters to the conferences."

Under date of December 11, 1943, the War Shipping Administration issued Operations Regulation No. 83, which will be found on page 53 of the Defendants' Exhibit 6, which provides:

> "Agents and general agents of the War Shipping Administration are hereby directed to instruct ships' personnel of the following practice to be observed in establishing quantities of Bunker Fuel Oil acquired or discharged."

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be granted to the end that this action may be reviewed and determined by this Court; and the order of the New York Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

PETER CALDAROLA,

By ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner.

Dated: New York, New York,
October 10, 1946.

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DEC 16 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),
Petitioner-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO., (Defendants-Respondents in the Court below),
Respondents-Appellees.

BRIEF FOR PETITIONER-APPELLANT

ABRAHAM M. FISCH.
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner-Appellant.
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 45 NEW CHAMBERS ST., N. Y.

INDEX

PAGE

Statement 1

Opinion of the Courts Below 2

Basis for Jurisdiction 2

Statement of the Matter Involved 3

Assigned Errors Intended to be Urged 3

POINT I—The decision of the New York Court of Appeals in the case at bar is contrary to the decision of this Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.* decided June 10, 1946 and *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 and is also in conflict with the decision of the Federal Circuit Court of Appeals in New York in the case of *Militano* v. *U. S. A., et al.* decided July 9, 1946 and reported in 1946 A. C. M., p. 1143 6

POINT II—The New York Court of Appeals was in error in holding that the agency agreement in the case of *Brady* v. *Roosevelt Steamship Company, supra*, decided by this Court differs with the agency agreement in the case at bar. It was likewise in error in deciding that the decision in the *Brady* case has no application to the facts in the case at bar 17

INDEX—(Continued)

PAGE

POINT III—The proof in the case at bar showing that the respondents operated and had possession and control of the vessel is stronger than in the cases decided by this Court in *Hust* v. *Moore-McCormack Lines, Inc.* and *Brady* v. *Roosevelt Steamship Company, supra,* and in the case of *Militano* v. *U. S. A., et al,* decided by the Federal Circuit Court of Appeals for the Second Circuit 19

The Defendants and the War Shipping Administration Contemplated Operation of the Vessel by the Defendants 20

The Defendants Were in Custody and Control of the Vessel 23

The Defendants Employed the Ship's Officers and Crew 24

CONCLUSION—It is respectfully submitted that the judgment of the Court of Appeals of the State of New York in favor of the respondents be reversed and such action taken by this Court as is appropriate under the circumstances 31

INDEX—(*Continued*)

CASES CITED

PAGE

Brady v. *Roosevelt Steamship Co.*, 317 U. S. 575.....5, 15, 17, 18, 19

Hust v. *Moore-McCormack Lines, Inc.*, decided June 10th, 1946.....4, 5, 8, 9, 15, 18, 19

Militano v. *U. S. A., et al.*, decided by Circuit Court of Appeals, 2nd Circuit on July 9, 1946.....2, 4, 5, 12, 15, 19

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),

Respondents-Appellees.

BRIEF FOR PETITIONER-APPELLANT

Statement

The petitioner-appellant's petition for writ of certiorari was granted by this Court. The writ was directed to the Court of Appeals of the State of New York to review its order entered on the 23rd day of July, 1946, a copy of which is annexed to the certified record submitted to this Court. The order of the Court of Appeals affirmed the order of the Appellate Division, which

reversed the judgment in favor of the petitioner-appellant and against the respondents Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., and dismissed the petitioner's complaint, two of the Justices dissenting, upon questions of fact and law. (See R. 5 to 6 of the Supplemental Additional Papers to the Court of Appeals.) (Note:—Two additional records were submitted to the Court of Appeals, one entitled "Additional Papers to the Court of Appeals", and the other entitled, "Supplemental Additional Papers to the Court of Appeals". It became necessary to file the "Supplemental Additional Papers to the Court of Appeals" because the order of the Appellate Division which originally reversed the judgment of the petitioner and dismissed the complaint, was on questions of law only. This was amended to state that the judgment was reversed and the complaint dismissed on questions of law and fact.

Opinion of the Courts Below

The case at bar was decided by the Court of Appeals on July 23, 1946 and reported in 295 New York 463. *Militano* v. *U. S. A., et al.* was decided by the Circuit Court of Appeals, 2nd Circuit on July 9, 1946 and is reported in 1946 A. M. C., p. 1143. The opinion of the Appellate Division in the case at bar in the court below is reported in 270 Appellate Division 563.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 38, Paragraph 5A. Another ground urged for jurisdiction is that the questions involved is of great public importance.

Statement of the Matter Involved

This case involves the interpretation of the general agency agreement made between the War Shipping Administration and the general agents concerning the operation of vessels during the war period. (See Agency Agreement, R. 337 to 355 and 359 to 363 and a book of Orders, Rules and Regulations of War Shipping Administration which are excerpts from Respondents' (Defendants') Exhibit No. 6, which Orders, Rules and Regulations are in a separate bound volume, and filed with the Clerk of this Court.

Petitioner-appellant, a longshoreman, was injured on the 27th day of January, 1944 while working on the deck of the Steamship *Everagra*, which vessel was owned by the United States of America (R. 20, 47, 22). The accident occurred because a defective cargo boom broke, and which the jury found was defective (R. 23). The petitioner-appellant was struck by the boom or by the tackle attached to it. The cause of action against the respondents relied upon by the petitioner-appellant was that the boom which broke and injured him was rotten and defective and it was the duty of the respondents, as general agent, to keep the said boom in a good condition of repair. Petitioner proved that the boom had been in a defective condition for five to ten years prior to the happening of the accident (R. 280, 281). The extent of the defect in the boom was testified to by witness John R. Russo (R. 66, 67) and Vincent Russo (R. 54, 55, 163).

Assigned Errors Intended to be Urged

The decision by the New York Court of Appeals in the case at bar, 295 New York 463, has created confusion

and is in direct conflict with the decision of *Hust* v. *Moore-McCormack Lines, Inc.*, decided by this Court on the 10th day of June, 1946 and reported in 1946 A. M. C., 727.

The decision of the New York Court of Appeals in the case at bar is also in direct conflict with the decision of the Federal Circuit Court of Appeals for the Second Circuit in the case of *Militano* v. *U. S. A., et al.* decided by the Circuit Court of Appeals on the 9th day of July, 1946 and reported in 1946 A. M. C. 1143.

Great confusion has resulted from the decision of the New York Court of Appeals. In the State of New York, the Federal Circuit Court of Appeals has followed this Court's decision in the *Hust* case, while the State Court of Appeals has refused to do so. We thus have this unfortunate situation. A litigant in the Federal Court in New York State receives one brand of justice, while a litigant in the State Court with an identical cause of action has his complaint dismissed.

The New York Court of Appeals in the case at bar, admitted that the agency agreement in the *Hust* case is identical with the agency agreement in the case at bar. In its opinion on page 466, the Court of Appeals stated:

> "The general agency contract made between the United States and defendant in the Hust case was identical with the contract of the present defendants with the government."

The New York Court of Appeals has held that under the agency agreement referred to, a third party who is injured on a vessel through a defect in the ship's equipment, has no cause of action against the agent. This Court in the cases of *Hust* v. *Moore-McCormack Lines*,

Inc., supra and *Brady v. Roosevelt Steamship Co.*, 317 U. S. 575 and the Federal Circuit Court of Appeals, in New York State in the case of *Militano* v. *U. S. A., et al, supra*, had held a contrary view.

The New York Court of Appeals, by its decision, erroneously held as follows:

1. That the respondents were appointed as agent to manage the business of the ship as distinguished from its physical operation.

2. That the respondents were not the operators of the ship.

3. That the respondents were not in possession and control of the vessel.

4. That the respondents were not responsible to third persons for the condition of the vessel.

5. That the agency agreement in the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 differs materially from the agreement in the case at bar and for that reason, the New York Court of Appeals held the *Brady* decision has no application to the facts in this case.

Under the various points we propose to set out portions of the opinion of the New York Court of Appeals in the case at bar and then to quote portions of the prevailing and concurring opinion of this Court in the case of *Hust* v. *Moore-McCormack Lines, Inc.*, holding a contrary view. We also propose to set forth the opinion of the Federal Circuit Court of Appeals for the Second Circuit in the case of *Militano* v. *U. S. A., et al, supra*, which followed the reasoning of this Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.* and *Brady* v. *Roosevelt Steamship Co., supra*. The de-

cision of the New York Court of Appeals is in direct conflict with the cases decided by this Court and the Circuit Court of Appeals in New York.

POINT I

The decision of the New York Court of Appeals in the case at bar is contrary to the decision of this Court in the cases of Hust v. Moore-McCormack Lines, Inc. decided June 10, 1946 and Brady v. Roosevelt Steamship Co., 317 U. S. 575 and is also in conflict with the decision of the Federal Circuit Court of Appeals in New York in the case of Militano v. U. S. A., et al, decided July 9, 1946 and reported in 1946 A. M. C., p. 1143.

In the case at bar, the New York Court of Appeals, in its decision which is reported in Volume 295, page 463, the Court by Desmond, *J.* stated:

> "Plaintiff, a longshoreman, was injured while working on the deck of a steamship moored at a New York City pier, by reason of the breaking of a defective cargo boom which is part of the ship's gear and which, the jury held was defective. Plaintiff was not a member of the ship's crew, but was an employee of an outside stevedoring contractor. The vessel was owned by the United States. Plaintiff sued defendants-respondents Eckert, alleging and attempting

to prove that those defendants were so much in possession and control of the ship, at the time of the accident, as to make them responsible to third persons lawfully on board for injuries caused by unsafe conditions of the ship. The jury found for plaintiff but the Appellate Division reversed upon the facts and law and dismissed the complaint • • •

That the defendants were not the operators of the ship or responsible to third persons for its condition • • •

Judge Desmond, on page 466, stated:

"We are in full agreement with the Appellate Division's conclusions and the reasons therefor as stated in its opinion. There would be no occasion for writing this opinion were it not for plaintiff's reliance on the decision of the United States Supreme Court (handed down the day before the argument of the present case in our court) in *Hust* v. *Moore-McCormack Lines, Inc.*, ... U. S. ....). In that case the Supreme Court reversed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who, unlike the present plaintiff, was a seaman. The 'General Agency' contract made between the United States and defendant in the *Hust* case was identical with the contract of the present defendants with the government. But Hust's suit was brought under the 'Jones Act' (U. S. Code, Tit. 46, Sec. 685) which gives a seaman a statutory cause of action in negligence against his employer. The majority opinion in the Supreme Court holds only that the Jones Act

should be liberally construed so as to give Hust a cause of action in negligence thereunder against the 'General Agent'. A concurring opinion by two of the Supreme Court Justices, in the *Hust* case, goes much further and construes the 'General Agency' contract as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party (See *S. R. A.* v. *Minnesota*, 90 Law. Ed. Advance Opinions, 663, 666)."

"We find nothing in this record to prove possession or control of the ship of these defendants Eckert and so hold with the Appellate Division that whatever his other remedy might be against the United States or anyone else (see the Federal Suits in Admiralty Act, U. S. Code, Title 46, Section 472), the plaintiff has no cause of action against the defendants * * *

We agree with the Appellate Division that *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 is not authority for plaintiff's position here, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it."

This Court in deciding the *Hust* case, stated in the majority and concurring opinion that the duty of keeping the ship in a good condition of repair rested upon

the general agent, who is the respondent in this case. The New York Court of Appeals in the case at bar, stated that the general agent was under no duty to third persons to keep the ship's appliances in a good condition of repair. Mr. Justice Rutledge, writing the prevailing opinion, stated:

> "It (the agent) was responsible for keeping the ship in repair and for providing the seamens' supplies."

Mr. Justice Rutledge, in various portions of the prevailing opinion, on more than one occasion, held that the general agent was the operator of the vessel. Mr. Justice Rutledge stated:

> "If this made them technically and temporarily employees of the United States it did not sever altogether their relation to the operating agent."

In another portion of the opinion Mr. Justice Rutledge stated:

> "But it does not follow from the fact that Hust was technically the government employee, that he lost all remedies against the operating agent."

Mr. Justice Douglas writing the concurring opinion in the *Hust* case, with whom Mr. Justice Black agreed, stated on page 748:

> "The agreement moreover specifically provides that the Master is an agent and employee of the United States * * * From this it is argued that the members of the crew were employees of the United States, not of the General Agent or operator.

If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575."

"This problem of liability to third persons is resolved by determining whose enterprise the particular venture was. The fact that the parties say it is the enterprise of one, not the other, is not the decisive. Control in the operation and management of the business, as distinguished from general supervision, is the customary test. I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business. Respondent, The General Agent, had a most substantial measure of control over the operation of the vessels. Its de facto control was no whit less or more whether the Master were called the agent of the owner or its own agent. The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control. Respondent maintains the vessels in the broadest sense and procures a Master and crew. In the *Brady* case the operation was 'to man, equip, victual, supply and operate the vessels.' 317 U. S. p. 576, 1943 A. M. C. 1. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 1941 A.M.C. 1214, 121 F. (2d) 190, 191. But the difference in words between the agreements in those cases and the present one does not, on a view of the entire situation, mark a difference in functions of the private operator. It is, indeed,

difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases. Respondent, of course, accounts for its operations to the United States. The United States reimburses it for all of its expenditures, including the wages of the crew. But it is immaterial that the owner provides the entire crew and pays their wages. A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 Fed. 878. So far as this record reveals the operator performed all of the functions which it performed in the *Brady* and *Quinn* cases. There is here no taking over of additional functions by the owner. The arrangement is clothed in different garb. But it is the private operator who manages and controls the physical operation. The powers reserved to the owner were general supervisory powers adequate for the exigencies of the war time conditions which prevailed. But they did not detract from the powers of physical operation granted respondent."

On page 749, the Court stated:

"The fact that we have no more than an agency in form not in substance is borne out by collateral phases of the undertaking. The compensation of respondent is not to be less than 'the account of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preferences, agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination order permissible thereunder as of March 22, 1942.' Art.

5. The United States agrees to reimburse respondent for 'damages or compensation for death or personal injury or illness' required to be paid. Art. 7. It also agrees to reimburse respondent for payments made by respondent to a pension fund for officers and members of the crew, as well as for 'social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise.'' Id.

On page 750, the Court stated:

"These provisions all suggest, as the relationship of the parties bears out, that the United States was the underwriter or the financial risks of the venture, the operator continuing as it always had to perform the managerial functions. These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice*. I think that is the true condition which existed here."

"At common law respondent would be the principal, for the business of managing and operating the vessel was its business. It was therefore the employer and responsible for this personal injury claim."

In the case of *Joseph Militano* v. *United States of America and States Marine Corporation*, decided by the United States Circuit Court of Appeals for the Second Circuit in New York, on July 9, 1946 and reported in 1946 A. M. C., page 1143, Judge Swan, speaking for the Court on page 1144 stated:

"The appellant was a stevedore in the employ of the United States at the Army Base, Brooklyn, N. Y. On January 19, 1943 he was ordered aboard the S. S. 'Benjamin Hawkins' to operate a winch at hatch No. 5 in loading government-owned cargo. This vessel was a Liberty ship owned by the United States and managed by States Marine Corporation under a general agency contract with the War Shipping Administration; she lay at a pier at the Army Base. While performing his work as winchman the appellant suffered injuries to the fingers of his left hand by reason, as he claims, of defects in the wire cable running from the drum to the gin block. To recover damages for such injuries he filed a libel against the United States and a civil action in tort against States Marine Corporation. A jury trial having been waived in the latter action the two cases were tried together to the Court and resulted in a judgment of dismissal in each."

On page 1146 the Court stated:

"Militano's injuries were caused by the fact that splinters or 'fish hooks', which had developed in some of the strands of the steel cable leading from the drum of the winch he was operating, caught in his glove and drew his left hand into the gin block before he could stop the winch. Relying on the *Brady* case, *supra*, he urges that the defective condition of the cable renders liable States Marine as the operating agent of the vessel. The defendant replies that under its agreement with the War Shipping Administration it had no control over the vessel or its crew, was not charged with the duty to repair but merely with the duty

to report the condition of the vessel to its principal, the United States, and, if the cable needed to be replaced, it devolved upon the crew to replace it, as spare cables were on board. It argues that the *Brady* case is inapplicable because of differences in the agency agreement there involved and the one under which it was acting. Those differences were pointed out in *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.) where the same form of 'Service Agreement' (GAA 4-4-42) was used as in the case at bar. But such differences cannot be deemed material, we think, in view of *Hust* v. *Moore-McCormack Lines, supra.* There it was held that a seaman injured by the negligence of a fellow member of the crew could maintain an action under the Jones Act against an operating agent employed under the same form of service agreement as States Marine had, the majority opinion stating (page 17, pamphlet edition):

> 'The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances enough to deprive seamen of that remedy.'"

On page 1147, the Court stated:

> "The concurring opinion of Justices Douglas and Black (page 3, pamphlet edition) clearly state their view that the difference in words between the standard agreement of the *Brady* case and the service agreement of the *Hust* case does not 'mark a difference in functions of the private op-

> erator.' If the agent remains the employer sufficiently to be liable to member of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owned by a landowner to a business visitor. *Grillo* v. *Royal Norwegian Government*, 139 F. 2d 237, 238 (C. C. A. 2); see *Pioneer S. S. Co.* v. *McCann*, 170 F. 873, (C. C. A. 6); *Glover* v. *Compagnie Generale Transatlantique*, 103 F. 2d 557, 559 (C. C. A. 5), cert. den. 308 U. S. 550."

The New York Court of Appeals in the case at bar in affirming the Appellate Division's ruling that the general agent was not liable to third persons for any defect of the vessel, refused to follow the decision of this Court in the *Hust* case because it was claimed the *Hust* case involved the Jones Act. The case of *Militano* v. *U. S. A., et al.*, decided by the New York Federal Circuit Court of Appeals in New York in July, 1946, *supra*, had a state of facts similar to the facts in the case at bar. In the *Militano* case, a longshoreman was injured as in the case at bar. The Federal Circuit Court of Appeals, of New York, in commenting upon this situation, in its opinion at page 1147 stated:

> "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor."

In the case of *Brady* v. *Roosevelt Steamship Company*,

317 U. S. page 575, Mr. Justice Douglas, speaking for the Court at page 576 stated:

> "S. S. Unicci was a vessel owned by the United States Maritime Commission and operated for it by respondent under a contract covering this and other vessels. * * * The deceased was a United States customs inspector. While boarding the vessel on his official duties in July, 1936 a rung of the ladder which he was climbing broke. The injuries which resulted caused his death. At the time of the injury the vessel was docked at a pier in New York City."

On page 580, the Court stated:

> "The liability of an agent for his own negligence has long been embedded in the law. *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, is a recent application of that principle to a situation very close to the present one. But the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567, 'An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.'"

On page 583, the Court stated:

> "Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law

creates cannot be so readily obtained. (*cf. Guaranty Trust Co.* v. *Green Cove R. R. Co.*, 139 U. S. 137, 143.) The rights of principal and agent *inter se are not* the measure of the rights of third persons against either of them for their torts."

POINT II

The New York Court of Appeals was in error in holding that the agency agreement in the case of Brady v. Roosevelt Steamship Company, supra, decided by this Court differs with the agency agreement in the case at bar. It was likewise in error in deciding that the decision in the Brady case has no application to the facts in the case at bar.

The New York Court of Appeals in the case at bar, and which is reported in 295 N. Y. 463, stated on page 467 as follows:

> "We agree with the Appellate Division that *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 is not authority for plaintiff's position here, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it."

This Court, both in the prevailing and concurring opinion held that the *Brady* decision was controlling in a matter involving the facts in the case at bar and that

there was no substantial difference between the agency agreement in the *Brady* case and the one considered in the *Hust* case, which is identical with the agency agreement in the case at bar.

Mr. Justice Douglas, in writing the concurring opinion in the *Hust* case, with whom Mr. Justice Black agreed, stated on pages 748 and 749:

> "In the *Brady* case the operator was to man, equip, victual, supply and operate the vessels. 317 U. S. page 576. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 1941 A. M. C. page 1214. But the difference in words between the agreement in those cases and the present one does not, on a view of the entire situation, mark that difference in functions of a private operation. It is indeed difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases."

Mr. Justice Rutledge, writing for the majority opinion in the *Hust* case, mentioned the *Brady* decision several times. On page 732, he stated:

> "It is around these questions and the effect for determining them of various authorities, particularly *Brady* v. *Roosevelt*, 317 U. S. 575 that the controversy is revolved in the State Courts and here."

POINT III

The proof in the case at bar showing that the respondents operated and had possession and control of the vessel is stronger than in the cases decided by this Court in Hust v. Moore-McCormack Lines, Inc. and Brady v. Roosevelt Steamship Company, supra, and in the case of Militano v. U. S. A., et al, decided by the Federal Circuit Court of Appeals for the Second Circuit.

Some of the proof in the case at bar relating to operation and control was not offered in evidence in the *Hust*, *Brady* and *Militano* cases *supra*. In addition to the agency agreement marked Plaintiff's Exhibit 1, which appears at Record, folios 1009 to 1089 and the rules and regulations issued by the War Shipping Administration after the General Agency agreement, Exhibit 1, had been entered into, which is marked Plaintiff's Exhibit 8, R. folios 1072 to 1089, there was offered in evidence Defendant's Exhibit 6, which is a book containing photostatic copies of orders and regulations issued by the War Shipping Administration and which will be submitted to this Court, together with the petition. In the *Hust* and *Militano* cases, *supra*, this Court and the Circuit Court of Appeals for the Second Circuit correctly held that under the agency agreement, the general agent was in possession and control of the vessel and operated the same. In neither case was the book containing photostatic copies of orders and regulations issued by the War Shipping Administration and marked Defendant's Exhibit 6, offered in evidence. These orders and regulations strengthen the claim that the general agent was in possession and in control of the vessel and physically operated the same.

At the outset, counsel desires to state that not a single order, direction or request was ever made by the United States Government, or the War Shipping Administration directly to any officer or member of the crew of any vessel operated under the general agency agreement. The general agent was in direct contact with the officers and crew, gave them their instructions and told them what to do.

Reading the general agency agreement and the rules and regulations issued by the War Shipping Administration to the respondents in the case at bar, the conclusion is irresistable that the respondents were the operators of the vessel and in possession and control of the same.

The Defendants and the War Shipping Administration Contemplated Operation of the Vessel by the Defendants

Plaintiff's Exhibit 1, R. 337 to 356 and the rules and regulations issued by the War Shipping Administration, after Plaintiff's Exhibit 1 had been entered into, which is marked Plaintiff's Exhibit 8, R. 358 to 363 and Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by W. S. A. and which has been submitted to this Court, must be read in their entirety to appreciate what the parties intended by the agency agreement and the rules and regulations mentioned.

In Article 16 of the agency agreement, R. 350, it is provided:

> "The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands * * * for injury to persons or property *arising out of or in*

any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder." (Italics ours.)

On page 74 of the Defendants' Exhibit 6, the following notation appears:

"WAR SHIPPING ADMINISTRATION

New York, New York

December 4, 1943

To: General Agents under Service Agreements with the W. S. A.

Subject: Maintenance and Repair Regulations No. 3.

Maintenance and Repair Regulations No. 1, Revised—Supplement No. 1.

In connection with repairs on vessels operated by your Company for account of War Shipping Administration, we are enclosing herewith, for your information and guidance, one copy of Maintenance and Repair Regulations, No. 1, Revised ——" (Italics ours.)

It will be noted that both the War Shipping Administration and the defendants assumed that the vessel was operated by the defendants; otherwise the War Shipping Administration would not have stated:

"In connection with repairs on vessels operated by your company. * * *"

Under date of May 31, 1943, the War Shipping Ad-

ministration issued Regulations No. 59 which appears on page 33 as follows:

> "Therefore, General Agents of the War Shipping Administration are hereby instructed to include in the Marine Index Bureau *all vessels assigned and delivered for operation under General Agency Agreement, as of May* 1, 1943." (Italics ours.)

On page 36 of Defendants' Exhibit 6, Regulations No. 65, it is provided:

> "General Agents are directed that when carrying cargo, cargo oil other than fuel oil, or fresh water in the forward deep tanks of Liberty vessels, the dump valves are to be blanked off."

Under date of October 8, 1942, appearing in Directive No. 1 on page 28 of Defendants' Exhibit 6, the following appears:

> "WAR SHIPPING ADMINISTRATION
>
> Washington
>
> October 8, 1942
>
> DIRECTIVE No. 1
>
> *To All General Agents and Agents of Vessels Owned by or Chartered to the War Shipping Administration*
>
> A frequent and most serious criticism of the American merchant marine has been the lack of discipline aboard ship, both at sea and in foreign ports. The War Shipping Administration is alarm-

ed that these conditions continue in the face of the present war situation. Lack of discipline and order aboard ship is intolerable. It cannot be allowed to continue.

The deterioration of the authority of the Master and licensed officers is the principal cause for the breakdown in discipline. It is essential that this authority be restored immediately and maintained.

All Masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration subsequent to the commitment of the violation." (Italics ours.)

It will be noted that in matters of discipline aboard vessels, the general agent's attention was called for action to be taken. The statement in the Directive:

> "All masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration * * *."

corroborates our claim that the general agent was the operator of the vessel.

The Defendants Were in Custody and Control of the Vessel.

The War Shipping Administration recognized the fact that under the general agency agreement and the regulations issued thereunder, the general agent was to be in custody and control of the vessel. At R. 347, Article 12, provides:

"In case of termination of this agreement,

whether upon expiration of the stated period hereof or otherwise, *all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this agreement, shall be immediately turned over to the United States.*" (Italics ours.)

At R. 346, Article 11 (a) provides:

"The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice."

Apparently both the United States and the defendants, as general agent, were of the opinion that the vessel under the agency agreement was under the control of the agent. Otherwise, the statement would not have been made in Article 11 that "The United States shall have the right to terminate this Agreement * * * and to assume control forthwith of * * * all said vessels."

The Defendants Employed the Ship's Officers and Crew

Under date of October 8, 1942, Directive No. 1 issued by the War Shipping Administration to general agent, and which appears on page 28 of the Defendants' Exhibit 6, the following is stated:

"You are instructed to place a copy of this communication, together with a copy of this letter, in the hands of all Masters and officers in *your employ.*" (Italics ours.)

Under date of June 22, 1942, the War Shipping Administration issued Operations Regulation No. 4, and which appears on page 67 of the Defendants' Exhibit 6 as follows:

> "Effective immediately, General Agents shall assign to each new vessel under construction and allocated to them by War Shipping Administration, a Master, Chief Mate, Chief Engineer and First Assistant Engineer, approximately thirty (30) days prior to the completion and delivery date."

We understand the word "assign" to mean "hire". This Operations Regulation No. 4 must be deemed to have modified the original agreement marked Plaintiff's Exhibit 1.

Article 1 of the Agency Agreement, R. 337, provides:

> "The United States appoints the General Agent . . . to manage and conduct the business of vessels assigned to it by the United States from time to time."

Article 2, R. 337, provides:

> "*The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations.*" (Italics ours.)

Article 3 (a), R. 338, provides:

> "Maintain the vessels in such trade or service as the United States may direct."

Article 3 [redacted] R. 338, provides:

"[redacted]ollect all moneys due to the United States under this Agreement and deposit, remit, or disburse the same."

Article 3 (c), R. 338, provides:

"Equip, victual, supply and maintain the vessels."

Article 3 (d), R. 338, provides:

"The General Agent shall procure the Master of the vessels, operated hereunder, subject to the approval of the United States. * * * The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel."

Article 3 (e), R. 339, provides:

"Issue or cause to be issued to shippers customary freight contracts and Bills of Lading."

Article 4 (a), R. 341 and 342, provides:

"The General Agent * * * shall keep its books, records and accounts relating to the management, operation, conduct of the business and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States."

Article 7, R. 344, provides:

"The United States shall reimburse the Gen-

eral Agent at stated intervals determined by the United States for all expenditures * * * *and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder* * * *. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, * * * damages or compensation for death, or personal injury or illness, and insurance, premiums; required to be paid by law." (Italics ours.)

Article 14 relates to maintenance, inspections and repairs and is the most important article in the agreement. It appears at R. 349 and provides as follows:

"The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering, hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels; and so advise the United States from time to time, in order that the United States may satis-

fy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable."

Plaintiff's Exhibit 8 (R. 358 to 363) is a supplement to Plaintiff's Exhibit 1 (R. 337 to 356), and shows that the agent had a substantial measure of control over the vessel. Section 2, subdivision (f), R. 361, provides:

"(f) Supervise to completion, irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Social and Bureau of Marine Inspection and Navigation, and approved changes and improvements."

Under date of June 1, 1943, the War Shipping Administration issued Operations Regulation No. 48, which will be found on page 12 of the Defendants' Exhibit 6, which reads as follows:

"Effective immediately, General Agents are directed to instruct Masters that stores, supplies and equipment are to be ordered through the vessels' port agents."

Under date of January 2, 1943, the War Shipping Administration issued Operations Regulation No. 30, which will be found on page 13 of the Defendants' Exhibit 6, which reads as follows:

"General Agents * * * are instructed to notify the Masters of such vessels to bolt down securely deep tank covers even when the deep tanks are used for carrying dry cargo."

Under date of February 16, 1943, the War Shipping Administration issued Operations Regulation No. 42, which will be found on page 15 of the Defendants' Exhibit 6, which provides:

> "In the interest of safety of the ships' personnel and the morale of crews, Agents and General Agents of the War Shipping Administration vessels are, therefore, directed to instruct the Master and Chief Engineer aboard each vessel to ascertain prior to the proceeding to sea, the condition of the floor plates in the engine and fire rooms of their vessels."

Under date of February 16, 1943, the War Shipping Administration issued Operations Regulation No. 43, which will be found on page 16 of the Defendants' Exhibit, which provides:

> "Agents and General Agents of the War Shipping Administration are directed to instruct Masters that wherever practicable water shall be utilized for ballast purposes in lieu of fuel oil."

Under date of March 10, 1943, the War Shipping Administration issued Operations Regulation No. 50, which will be found on page 18 of the Defendants' Exhibit 6, which reads as follows:

> "All agents and general agents are therefore directed to caution masters and crews of vessels calling at ports in foreign countries to discontinue payments in Dollar currency, etc."

Under date of November 2, 1943, the War Shipping Administration issued Operations Regulation No. 75, which will be found on page 37 of the Defendants' Exhibit 6, which reads as follows:

> "General Agents are directed to issue the following instructions to Masters of vessels owned by and under bareboat charter to the War Shipping Administration."

Under date of December 4, 1943, the War Shipping Administration issued Operations Regulation No. 81, which will be found on page 50 of the Defendants' Exhibit 6, which provides:

> "Agents and general agents of the War Shipping Administration are directed to instruct masters to inform Armed Guard Officers as to the time and place of convoy conferences in sufficient time to accompany the Masters to the conferences."

Under date of December 11, 1943, the War Shipping Administration issued Operations Regulation No. 83, which will be found on page 53 of the Defendants' Exhibit 6, which provides:

> "Agents and general agents of the War Shipping Administration are hereby directed to instruct ships' personnel of the following practice to be observed in establishing quantities of Bunker Fuel Oil acquired or discharged."

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals of the State of New York in favor of the respondents be reversed and such action taken by this Court as is appropriate under the circumstances.

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner-Appellant.

Dated: New York, New York,
December 14, 1946.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),
Petitioner-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),
Respondents-Appellees.

REPLY BRIEF FOR PETITIONER-APPELLANT

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner-Appellant,
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 45 NEW CHAMBERS ST., N. Y.

INDEX

	PAGE
Note	1
The Court of Appeals was in error when it decided that the respondents were not in possession and control of, and had no custody of the vessel	3
Where custody and control exists the general agent is liable irrespective of whether the tort constitutes non-feasance or mis-feasance	10
A private operator acting as a public agent performing a public duty is liable to third persons for his failure to comply with the terms of his contract	11
The decision by this Court involving a Federal Question is binding upon a State Court	12
The Trial Court properly instructed the jury on the issues involved	13
Conclusion—The order of the Court of Appeals should be reversed	14

INDEX—(Continued)

CASES CITED

PAGE

Antonsen v. *Bay Ridge Savings Bank*, 292 N. Y., page 143 11

Hust v. *Moore-McCormack Lines, Inc.*, 328 U. S., pages 734, 735 ..... 8, 11

Knickerbocker v. *Stewart*, 253 U. S., 149 at p. 160 13

Mollino v. *Ogden & Clarkson*, 243 N. Y., page 450 11

S. R. A. v. *Minnesota*, 327 U. S., page 558 12

S. R. A. v. *Minnesota*, 90 L. Ed. 663, at p. 667, 66 S. Ct. 749 (decided March 25, 1946) 13

Union Fish Co. v. *Erickson*, 248 U. S., 308, at 313 13

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Respondents-Appellees.

REPLY BRIEF FOR PETITIONER-APPELLANT

Note

Petitioner's cause of action does not rest upon the claim that the respondents were the operators of the vessel. (Although in fact they were.) Petitioner's contention appears in the opinion of the Court of Appeals in the case at bar, 295 N. Y., page 466, wherein the Court stated:

"Plaintiff sued defendants-respondents Eckert, alleging and attempting to prove that those defendants were so much in possession and control of the ship, at the time of the accident, as to make them responsible to third persons lawfully on board, for injuries caused by unsafe conditions on the ship."

Petitioner does not claim that any member of the crew was guilty of negligence or that the respondents were his employers. Petitioner has throughout this litigation contended that pursuant to Article 14 of the Agency Agreement (R. 349), the respondents were under a duty to maintain the vessel in a good condition of repair and that they were in possession and control of the vessel sufficient to make repairs. Petitioner has never changed his position (R. 98, 99, 102, 103).

The majority opinion in the *Hust* case held that the general agent was the employer of Hust. Mr. Justice Reed, in a dissenting opinion, disagreed with this contention. Mr. Justice Reed, however, did not disagree with the proposition that the general agent would be responsible for his own tort.

On page 747 Mr. Justice Reed stated:

"There is no reason here why the petitioner could not sue respondent for its alleged tort. What petitioner is attempting is to hold respondent liable as employer for negligence of petitioner's fellow servants, of petitioner's superiors, or the master under Merchant Marine Act. This it cannot do under this record."

On page 748 Mr. Justice Reed stated:

"Certainly Hust did not lose his remedies

against the agent for the agent's torts. He still has those remedies but petitioner (Hust) wishes to hold the agent as an employer."

The Court of Appeals was in error when it decided that the respondents were not in possession, and had no custody of the vessel.

The Court of Appeals in affirming the decision of the Appellate Division, found that under the General Agency Agreement (Exhibit 1, R. 337 to 356), and the Rules and Regulations issued by the War Shipping Administration, after Plaintiff's Exhibit 1 had been entered into, which is marked Plaintiff's Exhibit 8 (R. 358 to 363), and Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by the War Shipping Administration, and which has been submitted to this Court, *the respondents were to conduct the ship's business, as distinguished from its physical operation.*

While it is not always a simple matter to distinguish acts which refer to the ship's business from the duties which make up the physical operation of the vessel, yet in the main, the line of demarkation is clearly visible. The attorneys for the respondents have defined the activities making up the ship's business. This appears on page 11 of their brief and with a portion of it we are in accord. It is stated:

"A vessel's business includes such activities as the solicitation of the bookings of passengers and cargo; the purchase of food, victuals and supplies; the keeping of records; the collection and disbursement of money . . . ."

We intend to cite further excerpts from Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by the War Shipping Administration and filed with this Court, which will show that the respondents exercised a most substantial measure of physical control over the vessel.

1. On page 35 of the Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by the War Shipping Administration, operations, regulation No. 63, provides as follows:

> "Effective with the next signing of articles, general agents of all vessels presently employing a clerk typist are directed to employ instead a junior assistant purser at a basic monthly salary of $120.00."

The contention of the respondents has always been that they did not hire members of the ship's personnel, but simply supplied them to the master to be hired by the master. The above regulation number 63 shows that the respondents did the hiring.

2. On page 70 of the Defendants' Exhibit 6, operations, regulation No. 9, provides:

> "General agents of War Shipping Administration are authorized and directed to employ as a member of the crew of each E. C. 2 liberty type vessel one junior third mate subject to the following conditions."

This is another illustration where the master did not hire a member of the crew, but the agent did.

3. On page 10 of the Defendants' Exhibit 6 opera-

tions, regulation No. 20, provides:

> "Agents and general agents are further instructed to follow the directions and authorizations as issued by the district directors * * *.
>
> 2. reports of crew problems including shortage of personnel, insubordination, complaints, disputes, and like matters * * *."

The above direction to the general agents to handle insubordination, shortage of crew personnel and disputes on board the vessel shows clearly that the agents' duties were not confined to conducting the ship's business only, but contrary to the Court of Appeals decision, they were concerned in the physical operation of the ship.

4. On page 15 of the Defendants' Exhibit 6, operations, regulation No. 42, provides:

> "It has come to the attention of the War Shipping Administration that in many instances floor plates in engine rooms and fire rooms, removed for various reasons and replaced, are not secured by replacing the bolts and nuts. This practice might result in death or serious injury to members of the engine room personnel by the insecure plates flying through the air when vessels are subjected to enemy attacks. In the interest of safety of the ship's personnel and the morals of crews, agents and general agents of War Shipping Administration vessels are, therefore, directed to instruct the master and chief engineer aboard each vessel to ascertain prior to proceeding to sea the condition of the floor plates * * *."

5. On page 40 of the Defendant's Exhibit 6, operations, regulation No. 76, provides:

> "Agents and general agents of War Shipping Administration are directed to post the following notice on the bulletin boards of all vessels for the information of merchant marine personnel. In the event of the sinking of a vessel through enemy action, the attacking warship commander may attempt to question crew members who have taken to the lifeboats. In many instances masters and other key seagoing personnel have been taken prisoners. For this reason crew members should not disclose the presence of any officers in the lifeboats. In the rules set forth under the Geneva Convention of 1929, a prisoner of war is not required to give any information other than his name, date of birth, rank or rating and the name and address of his next of kin."

6. On page 14 of the Defendants' Exhibit 6, operations, regulation No. 41, it is provided:

> "Agents and general agents of War Shipping Administration vessels are directed to issue instructions to all vessels regarding the following formalities which are required by the Ministry of Marine of Brazil. * * * War and merchant vessels used as auxilaries and transports under the command of naval observers and having aboard a doctor may dock immediately as long as there exists aboard no suspect of illness, and the ship's doctor should personally deliver to the Port Health Authorities an advice that the ship is not a carrier of infectious or contagious diseases."

7. On pages 31 and 32 of the Defendants' Exhibit 6,

operations, regulation No. 58, it is provided:

> "Each agent and general agent is directed to make known these regulations to the ship's masters and to instruct them to comply therewith * * * all army personnel aboard the vessel whether or not they have been detailed for service thereon in the manner above stated, shall be subject to the orders of the transport commander, who will be charged with their care and discipline."

8. On page 23 of the Defendants' Exhibit 6, operations, regulation No. 55, it is provided:

> "General agents of American flag vessels owned by or under Bareboat Charters to the War Shipping Administration are directed to attach to all articles of such vessels which are hereafter opened the following rider: * * * It is agreed that the masters, officers and members of the crew shall be furnished the war risk insurance protection covering loss of life, disability * * *."

The foregoing shows clearly that the respondents' duties did not refer merely to the ship's business, but rather, to the ship's crew operating the vessel.

9. On page 361 of the record on appeal, Plaintiff's Exhibit No. 8, it is provided:

> "Subject to the foregoing, general agents shall:
>
> (a) Determine the repairs necessary.
>
> (e) Place in hand and award contracts for repairs.

(f) Supervise to completion irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and Navigation * * *."

We have referred to Exhibit 8 because the respondents contend that they were authorized to spend a certain amount for repairs on a vessel during one voyage. The Plaintiff's Exhibit No. 8 referred to shows that the respondents were not limited in any amount in awarding contracts for repairs.

10. On pages 128, and 90 of the record on appeal, Captain Bols of the vessel involved in the occurrence testified that when he went ashore after the ship's journey, he called up his office, meaning the office of the respondents. If in fact the respondents were not the captain's superior, the Captain would not have said that as soon as the vessel docks, he calls up his office.

Mr. Justice Douglas, in his concurring opinion in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S., pages 734, 735, has referred to Article 12 of Plaintiff's Exhibit 1 (R. 337 to 356), a portion of which is as follows:

"In case of termination of this agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the general agent pursuant to this agreement shall be immediately turned over to the United States, at times and places to be fixed by the United States * * *."

The attorneys for the respondents, realizing that such a clause in the agreement places the vessels in the custody of the respondents, have attempted to avoid the implication of such a clause. They say on page 30 of their brief:

> "In understanding these clauses it is necessary to have in mind that there are occasions when vessels do not have any masters at all. Indeed, there are times when they do not have crews. The latter occurs when they are in laid-up status. The general agency agreement, therefore contemplated that when this should occur general agents would have temporary custody of vessels."

We believe the foregoing to be wishful thinking.

The Court will note that Article 12 referred to speaks about the disposition of the vessels *at the termination of the contract.* The parties assumed that all vessels under the agency agreement were to be in the custody of the general agent, otherwise Article 12 would not have provided:

> "In case of termination of this agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the general agent pursuant to this agreement shall be immediately turned over to the United States, at times and places to be fixed by the United States . . ."

If as contended by the respondents, the United States Government had at all times custody of the vessel, and the respondents, as general agents had not, we cannot conceive of a situation where the respondents would

suddenly become custodians. Whatever rights or obligations existed between the parties are contained in the written agreement and the rules and regulations.

If the United States and the general agent had agreed that the general agents were to be the custodian of the vessels during the life of the agreement, it is but reasonable to assume that the parties would have provided a method of turning back the vessels to the Government when the agreement was terminated. The United States and the general agent knowing that all vessels were to be in the custody of the general agent naturally provided that *at the termination of the contract the vessels which had been in the custody of the general agent were to be turned back to the United States Government.*

It was assumed by the parties that the vessels were at all times to be in the custody of the agent up to the termination of the contract. *Article* 12 *provided that the termination of the contract, then and only then was the custody of the vessels to be transferred from the general agent to the United States Government.*

Where custody and control exists the general agent is liable irrespective of whether the tort constitutes non-feasance or mis-feasance.

The Appellate Division reversed the judgment in favor of the petitioner by a vote of 3 to 2. In writing its opinion on page 11 of the Additional Papers to the Court of Appeals, the Appellate Division stated:

> "The distinction between mis-feasance and non-feasance may be unimportant related to one in control of property who has a responsibility arising out of control, for the condition of the property and whose failure to repair a dangerous

condition may be regarded as negligent operation of the property * * *."

The Court of Appeals has held that a person out of possession will be deemed to be liable if he has a sufficient measure of control to make necessary repairs to his property. See *Antonsen* v. *Bay Ridge Savings Bank*, 292 N. Y., page 143; *Mollino* v. *Ogden & Clarkson*, 243 N. Y., page 450.

A private operator acting as a public agent performing a public duty is liable to third persons for his failure to comply with the terms of his contract.

Much has been stated by counsel for the respondents that any breach of the agent's obligation to make repairs pursuant to Article 14 of the Agency Agreement, Plaintiff's Exhibit 1 (R. 337 to 367), does not inure to the benefit of third persons. Public policy in our opinion would compel a different interpretation. The general agent had certain obligations under the agency agreement and the rules and regulations issued subsequent to the said agreement. These obligations were for the protection of all persons lawfully on vessels. It would not be in the interest of justice for an agent who has failed in his duty to make repairs to assert that he owes no duty to third persons. This Court, in its opinion in the *Hust* case, 66 Supreme Court, page 1218, stated at pages 1226 and 1227:

"Here indeed is the respondent's falacy, for it assumes the case would be controlled by the common law rules of private agency * * * no such obligation of the common law control test can be justified in this temporary situation unless by

inversion of that wisdom which teaches that 'The letter killeth, but the spirit giveth life'."

The Decision by this Court Involving a Federal Question is Binding Upon a State Court.

The Court of Appeals in its opinion in the case at bar, stated:

> "The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the 'General Agent'. A concurring opinion by two of the Supreme Court Justices, in the *Hust* case, goes much further and construes the 'General Agency' contract as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party. (See *S. R. A.* v. *Minnesota*, 90 Law. Ed. Advance Opinions, 663, 666)."

The facts in the case of *S. R. A.* v. *Minnesota*, which is reported in 327 U. S., page 558, were entirely different from the facts in the case at bar. In that case the State of Minnesota claimed a lien against real property owned by a citizen of the State of Minnesota. This Court held that the laws of Minnesota governed.

The question involved here is a maritime question and, therefore, a Federal question to be determined by Federal Law. Here, in fact, it is also a constitutional question (Art. 3, Sec. 2). On these questions there

must be uniformity throughout the United States and the Federal construction is enforceable in the State Courts.

> *Knickerbocker* v. *Stewart*, 253 U. S., 149, at p. 160.

Besides, the two agreements considered and construed in the *Hust* case were maritime contracts involving power conferred upon a governmental agency under Congressional laws and constitutional provisions referring to a system of law co-extensive with and operating uniformly in the whole country.

> *Union Fish Co.* v. *Erickson*, 248 U. S., 308, at p. 313.

Moreover, the United States was a party to both agreements. This alone makes the Supreme Court's interpretation binding on all courts. In the most recent case on the subject, *S. R. A.* v. *Minnesota*, 90 L. Ed. 663, at p. 667, 66 S. Ct. 749 (decided March 25, 1946), the Supreme Court says (p. 754):

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally determined by this Court."

The Trial Court Properly Instructed the Jury on the Issues Involved.

Counsel for the respondents have stated that the Trial Court was in error in its charge to the jury. The Appellate Division and the Court of Appeals of the State of New York merely reversed the plaintiff's judgment and dismissed the complaint. There was no find-

ing by the Appellate Courts that the Trial Court committed error in its charge to the jury. As a matter of fact the Trial Court did charge the jury that there was limited control sufficient to place an obligation upon the respondents to make repairs pursuant to Article 14 of the Agency Agreement (R. 307, 308, 309).

The Court will note that the original order of the Appellate Division reversed petitioner's judgment on the law. (Additional Papers to the Court of Appeals, page 4.) Due to the confusion created by the new Section 602 of the Civil Practice Act, it was necessary to resettle the order and as a result thereof, the Appellate Division made a new order reversing the judgment upon question of fact and law. (See Supplemental Additional Papers to the Court of Appeals, page 6.)

CONCLUSION

The order of the Court of Appeals should be reversed.

Respectfully submitted,

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner-Appellant.
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),
Petitioner-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

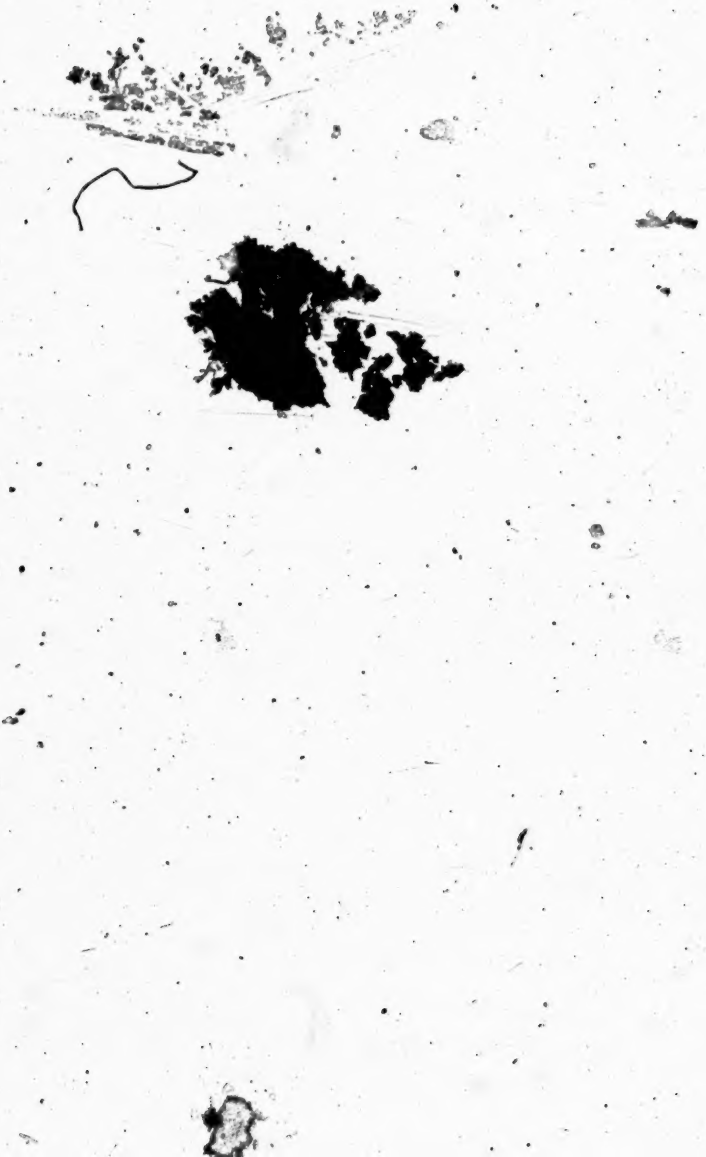
—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO., (Defendants-Respondents in the Court below),
Respondents-Appellees.

SUPPLEMENTAL BRIEF FOR PETITIONER-APPELLANT SUBMITTED PURSUANT TO LEAVE OF THE COURT.

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner,
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 48 NEW CHAMBERS ST., N. Y.



INDEX

PAGE

POINTS:

I—The Supreme Court has jurisdiction of all maritime torts irrespective of diversity of citizenship or the amount involved 1

II—The State Court of Appeals modified the maritime law and applied the decision of *Cullings* v. *Goetz*, 256 N. Y. 287 to the facts in the case at bar..... 7

III—The maritime law must be universally applied by the State and Federal Courts.

Where a State Court applies a local law to a maritime tort, this Court has jurisdiction to correct the error..... 13

IV—The federal laws regulating shipping, commerce, ships and wharves give jurisdiction to this Court..... 15

V—The petitioner having been injured on federal property while the vessel was in navigable water, this Court irrespective of all other grounds has jurisdiction of the subject matter..... 21

PAGE

VI—Although the Government contends that the respondents were liable to the petitioner, it urges this Court to make no finding of operation and control.

The Government does admit that there was limited control on the part of the respondents sufficient to permit them to make repairs 22

VII—The general agency agreement was prepared with the intention of eliminating jury trials 24

CASES CITED

Belden v. *Chase*, 150 U. S., page 674..... 6
Brady v. *Roosevelt Steamship Co.*, 317 U. S. 575..... 7, 8

Chelentis v. *Luckenbach S. S. Co.*, 243 U. S. 372..... 5
Cullings v. *Goetz*, 256 N. Y. 287.....7, 8, 9

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239..... 5
Hust v. *Moore-McCormack Lines*, 328 U. S. 734....7, 8, 10, 11

Illinois Steel Co. v. *B. & O. R. R. Co.*, 320 U. S. 508..... 4
In Re United States v. *Oregon*, 295 U. S., page 1..... 18

Katz v. *United States Shipping Board Emergency Fleet Corp.*, 32 Fed. 2nd, page 14..... 19
Kennedy v. *Cunard Steamship Co.*, 197 App. Div., page 359..... 5
Knickerbocker v. *Stewart*, 253 U. S. 149, 160.....5, 13

INDEX—(*Continued*)

PAGE

Malford v. Smith, 307 U. S., page 38..... 18

Quinn v. Southgate Nelson Corp., 121 Fed. 2d, 190.....7, 8, 9

Robins v. Dahl, 266 U. S., page 449.....2, 19

S. R. A. v. Minnesota, 66 Supreme Court Reports, 749 .....10, 11

Seas Shipping Co. v. Sieracki, 328 U. S., page 85..... 6, 7

Union Fish Company v. Erickson, 248 U. S. 308..... 4

STATUTES

35 Corpus Juris Secundum, at page 848..... 16

Title 28, U. S. Code, Section 41 (8)..... 15

Supreme Court of the United States

OCTOBER TERM, 1946

No. 625.

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),
Petitioner-Appellant,

—against—

MOORE-McCORMACK LINES, INC.,
Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO., (Defendants-Respondents in the Court below),
Respondents-Appellees.

SUPPLEMENTAL BRIEF FOR PETITIONER SUBMITTED PURSUANT TO LEAVE OF THE COURT.

POINT I.

The Supreme Court has jurisdiction of all maritime torts irrespective of diversity of citizenship or the amount involved.

During the argument before this Court, the question

was raised by some members of the Court as to whether there was jurisdiction to review where no diversity of citizenship existed. As we understand the rule, where the action is brought for a maritime tort, it may be instituted either in the Federal or in the State Court. In either case, the maritime law applies and the State Court is not at liberty to change the maritime law by applying a local law thereto.

The facts in the case of *Robins v. Dahl*, 266 U. S., page 449, were similar to the facts in the case at bar. The parties were residents and citizens of the State of New York and the action was brought in the State Court. There was no diversity of citizenship. The Trial Judge applied the local law to a maritime tort. This Court reversed the judgment of the State Court. Mr. Justice McReynolds delivered the opinion of the Court at page 454:

> "Defendant in error Dahl brought an action against the Robins Company—plaintiff in error—a New York corporation, in the Supreme Court, Kings County, New York, to recover damages for personal injuries. He alleged: That on February 2, 1920, while employed by the Robins Company and doing repair work on the steamer "El Occident", then lying in navigable water at Brooklyn, a plank scaffold on which he was walking or standing broke and caused him to fall into the hold. That he sustained serious injuries caused solely by and through negligence in that the company did not furnish a safe place to work and failed to provide a safe scaffold as required by the Labor Laws of the State of New York, but negligently and carelessly furnished an unsafe, inadequate and unsuitable scaffold and plank."

At page 457 this Court stated:

"The alleged tort was maritime suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rhode*, 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 382; *Union Fish Co.* v. *Erickson*, 248 U. S. 308; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. They would not have been different if the incident had occurred at San Francisco.

The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an Admiralty Court, and it was no less objectionable when given by the State Court. The error is manifest and material. See *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 21.

The judgment must be reversed."

The issue before this Court is the interpretation of a general agency agreement entered into by the War Shipping Administration with the respondents. The War

Shipping Administration was created by the proclamation of the President of the United States. The President, in turn was authorized by an Act of Congress to create all bureaus, agencies and departments as they became necessary. The President's authority appears on pages 16, 17 and 18 of this brief.

The case of *Illinois Steel Co.* v. *B. & O. R. R. Co.*, 320 U. S. 508, dealt with a situation similar to the case at bar. In that case the interpretation or construction of the clauses of a bill of lading adopted by the Interstate Commerce Commission pursuant to Congressional authority was before the Court for interpretation. Mr. Chief Justice Stone speaking for the Court at page 510, stated:

> "Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate shipment and are prescribed by Congress and the commission in the exercise of the commerce power, they have the force of Federal law and questions as to their meaning arise under the laws and Constitution of the United States. Hence, we have jurisdiction to review their determination by the State Courts in a suit by the carrier to recover freight charges."

The employment of the petitioner on a vessel in navigable waters being under a maritime contract, the law as declared by this Court should be followed by the State Court, for the maritime law is not subject to limitation by the State Court interpretation or decision. (*Union Fish Company* v. *Erickson*, 248 U. S. 308), and on these questions there must be uniformity throughout the United States. It is to enforce these principles that this Court takes jurisdiction in such cases erroneously

decided by State Court. (*Knickerbocker* v. *Stewart*, 253 U. S. 149, 160; *Chelentis* v. *Luckenbach S. S. Co.*, 243 U. S. 372.)

In the case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, this Court at page 254, stated:

> "So here in trying this case the State Court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under Sec. 237 (b) of the Judicial Code, 28 U. S. C., Sec. 344 (b), 28 U. S. C. A., Sec. 344 (b)."

The case of *Kennedy* v. *Cunard Steamship Co.*, 197 App. Div., page 359, affirmed by the Court of Appeals in 235 N. Y., page 604, was instituted in the State Court. The plaintiff brought suit for personal injuries sustained while he was employed as a longshoreman on a vessel alongside of one of the piers in New York City. The Appellate Division of the Supreme Court of the State of New York held that the action could be brought in the Federal or State Court, and under the Constitution of the United States, the maritime law was applicable and not the common law of the State of New York. The Court, at page 466, stated:

> "Article 3, Section 2, subdivision 1, of the Constitution of the United States extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Article 1, Section 8, subdivision 18, gives Congress the power to make all laws necessary for the execution of the powers granted. By Section 9

> of the Judiciary Act of 1789 the District Courts of the United States were given 'exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving the suitors, in all cases, the right of a common law remedy where the common law is competent to give it.' This grant was continued by the United States Revised Statutes, Sections 563 and 711, and by the Judicial Code, Sections 24 and 256. There have been numerous decisions construing this section. These cases settle the law to be that actions in rem, whether arising under the general maritime law or to enforce liens given by the United States or local state statutes, must be prosecuted in admiralty in the United States Courts, while actions in personam, arising out of maritime contracts or torts, may be brought in admiralty or on the law side of the United States Court or in a state court having an appropriate common law remedy.' * * *."

In the case of *Belden* v. *Chase*, 150 U. S., page 674, this Court, on page 691, stated:

> "This action was for a maritime tort committed upon navigable waters and within the admiralty jurisdiction, and the Appellate jurisdiction of this Court over questions of national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common law remedy in a state court."

In the case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S., page 85, this Court, at page 99, stated:

"It is that for injuries incurred while working aboard the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is in short a seaman because he is doing a seaman's work and incurring a seaman's hazards."

POINT II.

The State Court of Appeals modified the maritime law and applied the decision of Cullings v. Goetz, 256 N. Y. 287 to the facts in the case at bar.

The State Court of Appeals in its decision in the case at bar and its reliance upon the decision in the case of *Cullings* v. *Goetz, supra,* as the law of the case, modified the maritime law as enunciated by this Court in the cases of *Quinn* v. *Southgate Nelson Corp.*, 121 Fed. 2d, 190; *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575; *Hust* v. *Moore-McCormack Lines*, 328 U. S. 734 and *Seas Shipping* v. *Sieracki*, 328 U. S. 85. The manner in which the maritime law was modified disapproved of or changed by the New York State Court of Appeals is as follows:

1. The State Court of Appeals modified the maritime law in holding that a general agent owed no duty to the petitioner, a longshoreman, to keep the vessel in a good condition of repair.

This Court has ruled otherwise in the cases of *Quinn* v. *Southgate Nelson Co., supra, Brady* v. *Roosevelt Steamship Co., supra* and *Hust* v. *Moore-McCormack Lines, supra.*

2. The State Court of Appeals modified the maritime law in holding that the agent must be in absolute control before he may be held liable. This Court has ruled that an agent will be deemed liable if he has a measure of control as distinguished from absolute control.

The Court of Appeals in the *Cullings* v. *Goetz, supra,* on pages 289, 290, stated:

> "Liability in tort must be confined to the lessee whose possession and dominion were exclusive and complete."

On page 290 the Court stated:

> "The power to control * * * implies the power and the right to admit people to the premises and to exclude people from them."

This Court has not followed the narrow construction of liability against an agent as expounded by the Court of Appeals in the *Cullings* v. *Goetz, supra* case. The agent may be in joint control with others and yet be responsible for his failure to make repairs pursuant to his obligation. If he has access to the vessel and a sufficient measure of control, he will be deemed to be liable. In the case of *Quinn* v. *Southgate Nelson Corp.*, 121 Fed. 2d, page 190, which was mentioned with approval by this Court in the case of *Brady* v. *Roosevelt Steamship Co., supra* and *Hust* v. *Moore-McCormack Lines, Inc., supra* the Circuit Court of Appeals, on page 191, stated:

> "Common sense and the precedents make the applicant liable on the facts in this case. It had a most substantial measure of control over the operation of the vessel. It was paid to manage, operate and conduct the business of the line. The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of defacto control, and there is no showing that in fact the owner did substitute itself as manager either generally or at the time of the accident. Even if the Maritime Commission selected the officers as appellants contend, the appellant was not ousted of control."

When we compare the decision of the Circuit Court of Appeals in the *Quinn* case which holds that only partial control is necessary and expounds the true principle of an agent's obligation for a maritime tort with the decision of the Court of Appeals in the *Cullings* v. *Goetz, supra*, case, we find that the theory of the agent's liability for a maritime tort has been modified by the Court of Appeals in the *Cullings* v. *Goetz* case. The *Quinn* case holds the agent liable because

> "It had a most substantial measure of control over the operation of the vessel."

The *Cullings* decision holds that in order for an agent to be liable, control must be so absolute over the premises that the occupant would have "the power and the right to admit people to the premises and to exclude people from them".

3. The State Court of Appeals modified the maritime law in deciding that the agency agreement and the rules and regulations issued thereunder required the

agent to conduct the ship's business as distinguished from its physical operation. This Court in the cases mentioned under this point found to the contrary. The data which the petitioner has set forth in his briefs shows clearly that the agent had a measure of control over the operation of the vessel.

4. The State Court of Appeals modified the maritime law when it applied the rules of private agency contrary to the decision of this Court in the case of *Hust* v. *Moore-McCormack Lines, supra.* This Court in its decision in the *Hust* case stated:

> "Here indeed is the respondent's falacy, for it assumes the case would be controlled by the common law rules of private agency—no such application of the common law control test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life'."

In the case of *S. R. A.* v. *Minnesota*, 66 Supreme Court Reports, 749, decided by this Court, March 25, 1946, this Court stated:

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally determined by this Court."

5. The State Court of Appeals did not consider Article 3, Section 2, subdivision 1 of the Constitution of the United States and failed to apply the general principles of the maritime law to the facts in the case at bar.

6. The State Court of Appeals refused to follow this Court's ruling in the case of *Hust* v. *Moore-McCormack*, 328 U. S. 734. In referring to the *Hust* decision, the State Court of Appeals in its decision, said:

> "The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the general agent. A concurring opinion by two of the Supreme Court Justices in the *Hust* case goes much further and construes the general agency contract as putting the agent in possession and in control of the ship. Since that minority holding is not the holding of the court we are not bound to follow it nor to decide whether if it were the decision of the court we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party. (See *S. R. A.* v. *Minnesota*, 90 Law Ed., Advance Opinions, 663, 666.)"

The facts in the case of *S. R. A.* v. *Minnesota*, *supra*, were entirely different from the facts in the case at bar. In that case the State of Minnesota claimed a lien against real property owned by a citizen of the State of Minnesota. This Court held that the laws of Minnesota governed. The question involved here is not of local concern, but is a maritime question, and therefore a Federal question to be determined by Federal Law.

The Government counsel, on pages 20 and 21 of their brief, *amicus curiae*, state:

> "The court below appears to have decided the present case in reliance upon *Callings* v. *Goetz*,

256 N. Y. 287, 290, holding that 'Liability in tort is an incident to occupation or control'. While that may be the local rule in New York, we do not think that it necessarily controls this case. From the decisions of this court it seems clear that petitioner's right to recover depends on maritime law and not on New York law. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243; *Intagliata* v. *Shipowners & Merchants Towboat Co.*, 26 Cal. 2d, 365. A right sanctioned by the maritime law may be enforced in the state courts but nothing gives the complaining party 'an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law.' *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384; *Colonna Shipyard* v. *Bland*, 150 Va. 349, 385. If, as appears, this case is here as one of first impression under the law maritime, this Court may, as in other cases governed by federal law, resort to the customary materials of decision in fashioning a rule."

POINT III.

The maritime law must be universally applied by the State and Federal Courts.

Where a State Court applies a local law to a maritime tort, this Court has jurisdiction to correct the error.

In the case of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S., 149, this Court, at page 166, stated:

> "Obviously if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

This Court in the *Knickerbocker Ice Co.* v. *Stewart*, *supra*, at page 160, stated:

> "As the plain result of these recent opinions and the earlier opinions upon which they are based, we accept the following doctrine; the Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the Admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or Judicial decision, to contravene the essential purpose; of, or, to work

material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within the control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, Federal Courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. That we have a maritime law of our own, operative throughout the United States, cannot be doubted * * * one thing, however, is unquestionable; the Constitution must be referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is

quite impossible for a multitude of adjudications by admiralty courts. See *Workman* v. *New York City*, 179 U. S. 552, 557, *et seq.*

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten. Also, it should be noted that federal laws are constantly applied in state courts—unless inhibited from duty so requires. Constitution, Article VI, Clause 2, Second Employers' Liability Case, 223, U. S. 1, 55. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon National Courts, could not create substantive rights or obligations or indicate assent to their creation by the states."

POINT IV.

The federal laws regulating shipping, commerce, ships and wharves give jurisdiction to this Court.

Title 28 U. S. Code, Section 41 (8) states:

"The district courts shall have original jurisdiction as follows:

* * * * * * * * *

Eighth: Of all suits and proceedings arising under any law regulating commerce. (Mar. 3, 1911, C. 231, Sec. 24, par. 8, 36 Stat. 1092; Oct. 22, 1913, C. 32, 38 Stat. 219.)"

In *35 Corpus Juris Secundum*, at page 848, the following appears:

> "A suit or proceeding is within the jurisdiction of the district courts, if it arises under a federal law regulating commerce, without regard to the amount in controversy or diversity of citizenship. Judicial Code, Sec. 24 (8) 28 U. S. C. A., Sec. 41 (8)."

The action instituted by the petitioner was one which concerned commerce. Loading and discharging a vessel is considered in aid of commerce. The Courts have so held.

The War Shipping Administration owned the vessel upon which the petitioner was injured. The War Shipping Administration and the respondents, as general agents, entered into the agreement, Plaintiff's Exhibit 1. In addition to this agreement, the War Shipping Administration issued rules and regulations subsesequent to the execution of the agency agreement referred to and which had been submitted to this Court in book form marked Defendant's Exhibit 6.

The War Shipping Administration was created by the proclamation of the President of the United States. The President, in turn, was authorized by an Act of Congress to create all bureaus, agencies and departments which became necessary. The President by proclamation substituted the War Shipping Administration in place of the Maritime Commission, and transferred all the duties of the Maritime Commission relating to the vessels used in commerce, to the War Shipping Administration. Therefore, the interpretation of the agency agreement, Plaintiff's Exhibit 1, is the interpretation of an instrument formed pursuant to a statute created by Congress. The President's proclamation is an Act

under the authority of Congress and has the force of law.

If the general agents, the respondents in the case at bar, violated the terms of the agency agreement, the violation and the interpretation of such agreement to ascertain whether it was violated constitutes a Federal question.

By executive order number 9054, February 7, 1942, 7 Federal Register 837, as amended by Ex. Or. 9244, September 16, 1942, 7 Federal Register 7327, there was established a War Shipping Administration in the executive office of the President and defining its functions and duties pursuant to the First War Powers Act, *supra*, the executive order 9054 states:

> "By virtue of the authority vested in me by the Constitution and Statutes of the United States, including the First War Powers Act, 1941 (Tit. 50 U. S. C., App. Secs. 601, 602), approved December 18, 1941, as President of the United States and as Commander-in-Chief of the Army and Navy, and in order to assure the most effective ultilization of the shipping of the United States for the successful prosecution of the war, it is hereby ordered:
>
> 1. There is established within the office for Emergency Management of the Executive Office of the President a War Shipping Administration under the direction of an administrator who shall be appointed by and be responsible to the President.
>
> 2. The administrator shall perform the following functions and duties:
>
> • • • • • • • •

> 3. The functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance and requisition of vessels and facilities required for the operation thereof and the issuance of warrants with respect thereto under the Merchant Marine Act of 1936, * * * and under any other provisions of law, including Executive orders, are hereby transferred to the Administrator; * * *"

In the case of *In Re United States* v. *Oregon*, 295 U. S., page 1; Mr. Justice Stone in writing the opinion at page 125 stated:

> "The executive order setting aside the area in question as a bird reservation was an assertion of title and possession."

On page 127 the Court stated:

> "The construction of grants by the United States is a Federal, not a State question."

In the case of *Mulford* v. *Smith*, 307 U. S., page 38, the Court, at page 48, stated:

> "Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under subsection (1) U. S. C. Tit. 28, Sec. 41 (1) of Section 24 of the Judicial Code, the case falls within subsection (8) U. S. C. Tit.

28, Sec. 41 (8) which confers jurisdiction upon District Courts of all suits and proceedings arising under any law regulating commerce."

* * * * * * *

At page 48:

"Any rule, such as that embodied in the Act, which is intended to foster, protect, and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and a fortiori to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation."

In the case of *Robins* v. *Dahl, supra*, this Court at page 457, stated:

"The alleged tort was maritime suffered by one doing repair work on board a completed vessel. * * * The matter was not of mere local concern, as in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, *but had direct relation to navigation and commerce*. * * *." (Italics ours.)

The case of *Katz* v. *United States Shipping Board Emergency Fleet Corp.*, 32 Fed. 2d, page 14, decided by Judge Campbell in the United States District Court for the Eastern District of New York on March 5, 1929 involved a state of facts similar to the facts in the case at bar.

The Court there held that the statute relating to commerce applies in an action brought by one injured on a vessel in navigable waters. While it is true Judge Campbell did not mention anything about diversity of citizenship, he did state in his opinion that the Federal Court had jurisdiction irrespective of the amount involved. Judge Campbell in his opinion, stated:

> "This is a motion made by the plaintiff to remand to the Municipal Court of the City of New York the above entitled action.
>
> The action was brought to recover for injuries alleged to have been sustained by the plaintiff, a visitor to a ship and lawfully traversing a passageway on Pier 4, Hoboken, caused by the defendants placing and permitting an obstruction thereto.
>
> The action arises under a law regulating commerce, within the intent and meaning of subdivision 8 of section 24 of the Judicial Code, and therefore this Court has jurisdiction, although the amount involved is but $1,000. *Harry Porter Co.* v. *United States Shipping Board Emergency Fleet Corporation (D. C.)*, 284 F. 397; *Hill* v. *United States Shipping Board Emergency Fleet Corporation (D. C.)*, 284 F. 398.
>
> The motion is denied."

POINT V.

The petitioner having been injured on federal property while the vessel was in navigable waters, this Court irrespective of all other grounds has jurisdiction of the subject matter.

The War Shipping Administration owned the vessel upon which the petitioner was injured. The agency agreement under which petitioner's cause of action arose was entered into by the War Shipping Administration with the respondents pursuant to the proclamation of the President of the United States who in turn received his power to do so from an Act of Congress as hereinbefore mentioned.

The petitioner was injured on a government owned vessel, which was in navigable waters. The action in the first instance could have been brought in the Federal Court. Under the circumstances, jurisdiction is vested in this Court.

POINT VI.

Although the Government contends that the respondents were liable to the petitioner, it urges this Court to make no finding of operation and control.

The Government does admit that there was limited control on the part of the respondents sufficient to permit them to make repairs.

On page 22 of their brief, the attorneys for the Government state:

> "The rationale of the rule is plain and would appear to be equally applicable here. If the agent binds himself by contract exclusively to inspect, maintain and repair the property, he creates the risk that his failure to perform his obligation will cause injury to innocent third parties. Consequently, the agent is under a duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent."

On page 18, the Government attorneys state:

> "A holding that respondent was not in possession of the vessel nor the employer of the crew within the rule of respondeat superior is not incompatible with respondent's liability upon the record now before the Court."

On page 4 of its brief, the Government contends:

> "In numerous situations it is of the greatest importance that the United States and not its general agents be held to be the owner in possession and control of its cargo vessels. If the general agent be held to be the owner pro hac vice in possession and control, the United States will be required to defend before juries in the state courts suits brought against its general agents on account of negligent navigation by the master and crew of its cargo vessels."

The position thus far taken by the attorneys for the Government seems somewhat inconsistent with their later admission that the general agents, the respondents, did have limited control sufficient to make repairs. On page 21 of their brief, the attorneys for the Government state:

> "An analogous situation is found in the case of managing agents who, while having neither possession nor physical control of property, have entire charge of its operation so as to be exclusively responsible for its maintenance. *Such agents, known as 'real estate management companies', have an implied license to enter and exercise the limited control necessary to make inspections and repairs.* Their liability has been summarized in Section 387 of the American Law Institute, Restatement of the Law of Torts, as follows:
>
> 'An independent contractor or servant to whom the owner or possessor of land turns over the entire charge thereof is subject to the same liability for harm caused to others within or outside the land by his failure to

exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land.'

And see Restatement, Agency, Section 354; Comments, a, c, and d; 1 Mechem, Agency (2d ed., 1914), pp. 1086-1092." (Italics ours.)

POINT VII.

The general agency agreement was prepared with the intention of eliminating jury trials.

When the war was declared, the Government sought experienced ship operators to conduct the operation of its merchant marine. With that in view the general agency agreement was prepared. In preparing this agreement, much thought was given by those whose interest would be served to eliminate jury trials and so the agreement (Petitioner's Exhibit 1) was prepared. Words were used in one portion of the agreement which intended to place the operation and control of the vessels in the hands of the Government. Nevertheless, the Government had to put into the agency agreement and in the subsequent rules and regulations now before this Court the duties which the general agents were to discharge. These duties undoubtedly contradicted the words which were used in other portions of the agency agreement and made the agents the custodians and in control of the vessels. We say sincerely that this is another instance where actions speak louder than words. The mere fact that the agency agreement contains words to the effect that the

operation of the vessel shall be under the control of the Government is not binding when the actual duties discharged by the agent under the agency agreement points to operation and control.

Respectfully submitted,

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner.
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

FILE COPY

OCT 29 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

No. 625, October Term, 1946.

Peter Caldarola (Plaintiff-Appellant in the Court below),
Petitioner,

against

Moore-McCormack Lines, Inc.,
Defendant,

and

Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co. (Defendants-Respondents in the Court below),
Respondents.

CONSENT OF RESPONDENTS TO GRANTING PETITION FOR CERTIORARI

Now comes Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Company, and consent to the granting of the petition for Writ of Certiorari herein, but without accepting or adhering to any of the arguments set out in the petition, and still disputing them. They also urge the court to grant the petition, because they are of the opinion that it is desirable that the questions left undecided by the decision of this court in *Hust* v. *Moore-McCormack Lines, Inc.*, decided June 10, 1946, should be decided now by a full bench. Thus, there will end such confusion as has been indicated in the decision of *Militano* v. *United States of America*, 156 F. 2d

99, where, apparently, the court thought that the *Hust* decision required a result which obtained the support of only two of the judges of the Supreme Court who participated in the decision.

RAYMOND PARMER,
Counsel for Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Company,
120 Broadway,
New York 5, N. Y.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1916

No. .....

PETER CALDAROLA,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co. (Defendants-Respondents in the Court below),

Respondents.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Attorneys for Petitioner International Longshoremen's & Warehousemen's Union.

OF Counsel:
JACQUIN FRANK,
ARTHUR LEONARD ROSS.

INDEX

PAGE

PETITION 1

BRIEF:

Preliminary Statement 5

POINT I—This Court having found no difference in the functions of the operating agent under the Standard Agreement in the *Brady* case and the General Service Agreement in the *Hust* case (which is identical with the agreement in the instant case), the New York Court was bound by such interpretation (a) of a maritime contract, (b) of an agreement with the United States. The meaning given to the General Service Contract by this Court makes the *Brady* case controlling 6

FINAL POINT—The judgment of New York Court of Appeals should be reversed and such action taken by the Court as is appropriate 23

TABLE OF CASES AND AUTHORITIES

American Jurisprudence, Vol. 2, page 254, Section 325 18

Brady v. Roosevelt S. S. Co., 317 U. S. 575 ..... 6, 7, 9, 13, 14, 15, 18, 20, 21

Caldarola v. Moore-McCormack Lines, Inc., 295 N. Y. 463 5

Dudley v. Community Public Service Co., 108 F. (2d) 119 18

Ellis v. McNaughton, 76 Mich. 237 18

Hust v. Moore-McCormack Lines, Inc., U. S. , 90 L. Ed. 1220, 66 S. Ct. 1218 ..... 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19

PAGE

International Stevedoring Co. v. Haverty, 272 U. S. 50 19

Knickerbocker v. Stewart, 253 U. S. 149 8

Leary v. U. S., 10 Wall. 591 21

Little v. Banks, 85 N. Y. 258 10

McMahon v. Second Ave. R. R. Co., 75 N. Y. 232 10

Mahnich v. Southern S. S. Co., 321 U. S. 96 11

Mechem on Agency, 2nd Ed., Vol. 1, Section 1464 11

Militano v. U. S. A., 156 F. (2d) 599 12

Reed v. U. S., 11 Wall. 591 21

Restatement of the Law of Contracts, Section 145 10

Robinson v. Chamberlain, 34 N. Y. 389 10

S. R. A. v. Minnesota, U. S. , 90 L. Ed. 663, 66 S. Ct. 749 8

Seas Shipping Co. v. Sieracki, U. S. , 90 L. Ed. 809, 66 S. Ct. 872 ..... 11, 20

Union Fish Co. v. Erickson, 248 U. S. 308 8

U. S. Constitution, Art. 3, Sec. 2 8

U. S. v. Shea, 152 U. S. 178 21

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OCTOBER TERM, 1946

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PETER CALDAROLA, *Petitioner,*

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MOORE-McCORMACK LINES, INC.,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co. (Defendants-Respondents in the Court below),

Respondents.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the International Longshoremen's and Warehousemen's Union, respectfully petition this Honorable Court for leave to file the accompanying brief *amicus curiae*.

The International Longshoremen's and Warehousemen's Union is a union consisting of approximately 75,000 members, most of whom perform work on shipboard or along-

side ships or connected with waterfront docks. Among the membership there are approximately 20,000 longshoremen who work in all of the ports of the Pacific Coast, including Alaska, as well as in the ports of the Hawaiian Islands.

The members of this organization are vitally interested in the position taken by the New York Court of Appeals in the above case, which was a suit by a longshoreman under circumstances frequently occurring in this employment. Longshoremen throughout the country have suits pending in the various courts throughout the United States that will be vitally affected by the ultimate outcome of the decision here. Moreover, for many years the said Union has sought, through collective bargaining, to improve the safety conditions on the Pacific Coast for its members, and has urged the adoption of a safety code. The Union is keenly conscious of the rights of its members whenever and wherever accidents occur involving maritime law, and is greatly concerned over improper limitations and restrictions of maritime rights. Furthermore, the Union has fostered legislation to broaden, extend and clarify the rights of longshoremen and has taken official positions before Congressional Committees in connection with and involving the rights of longshoremen.

Upon these considerations, special leave is respectfully sought to present the annexed brief in support of the petitioner's contention.

In advance of the preparation of this motion, counsel for the petitioner has secured the express consent of Abraham M. Fish, Esq., the attorney for the petitioner herein, to the filing of this brief as *amicus curiae*, but counsel for the respondent herein has declined so to consent.

WHEREFORE, your petitioner respectfully petitions this Court for leave to file the accompanying brief *amicus curiae*, and that the judgment of the New York Court of Appeals should be reversed.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Attorneys for Petitioner,
240 Montgomery Street,
San Francisco 4, California.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JACQUIN FRANK, being duly sworn, deposes and says, that he is counsel for the attorneys for the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JACQUIN FRANK.

Sworn to before me this
4th day of March, 1947.

SARA RIELL.

Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

PETER CALDAROLA,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co. (Defendants-Respondents in the Court below),

Respondents.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement

There is an important question of law in *Caldarola* v. *Moore-McCormack Lines*, 295 N. Y. 466, which directly affects longshoremen and persons having business on ships while in port. Many of them are members of the I. L. W. U. and many of them have suits pending in the various courts throughout the United States to recover damages for injuries sustained on board ship while in port for loading and discharging vessels.

The vital question is whether a State Court may disregard this Court's interpretation of a government contract in an action by a longshoreman against an operating agent servi

ing and maintaining a vessel under a uniform, standard contract identical with the contract construed by this Court in *Hust* v. *Moore-McCormack Lines, Inc.*, 90 L. Ed. 1220, 66 S. Ct. 1218. *Caldarola* sued for injuries suffered on shipboard of a vessel in port, caused by defects in its appurtenant appliances and equipment.

POINT I

This Court having found no difference in the functions of the operating agent under the Standard Agreement in the *Brady* case and the General Service Agreement in the *Hust* case (which is identical with the agreement in the instant case), the New York court was bound by such interpretation (a) of a maritime contract, (b) of an agreement with the United States. The meaning given to the General Service Contract by this Court makes the *Brady* case controlling.

The petitioner, a longshoreman, was injured while working on the deck of a ship while in port by the breaking of a defective cargo boom, a part of the ship's gear and which the jury held was defective.

The ship was being serviced by respondent under the General Agency Service Agreement with the United States.

The New York Court of Appeals held that:

(a) The respondent did not operate the ship and any failure on its part to perform duties assigned to it by the United States in connection with repairs to the ship was "strictly non-feasance" for which it was answerable to its principal, the United States and not to the petitioner.

(b) The *Brady* case is not authority for the petitioner's position, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it.

(c) The *Hust* case did not apply because the majority opinion held only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the "General Agent". It was only the concurring minority who held that under the General Agency Service Agreement the agent was in possession and control of the ship and, therefore, such holding was not binding on the New York Court.

(d) That it was not obliged to decide whether the *Hust* case should be followed as being a question of maritime law or because it is a construction of a contract to which the United States is a party.

As a matter of orderly and logical sequence in the development of our argument we believe it wise to first dispose of the New York Court's last contention (d) and discuss: 1. What agreements did this Court construe in the *Hust* case? 2. Is the New York Court bound to follow such construction, and why?

1. What agreements did this Court construe?

This Court considered at great length the General Service Agreement and the Standard Argreement involved in the case of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, determining the meaning of the agreements as a whole, separate provisions, words, their effects, how the private operator functioned under them, a comparison between the two agreements, and reached the conclusion that the two agreements were, in effect, substantially the same and that, despite the "meticulous" differences, the operating agent functioned alike under both agreements.

In view of the holding in the *Brady* case, and our contention, *infra*, that the same is controlling in the case at bar, the question as to the binding force of this Court's interpretation of these two agreements in the *Hust* case on the New York Court becomes important.

2. Is the New York Court bound to follow such construction, and why?

At the outset we find that the question involved is a maritime question and, therefore, a Federal question to be determined by Federal law. Here, in fact, it is also a constitutional question (Art. 3, Sec. 2). On these questions there must be uniformity throughout the United States and the Federal construction is enforceable in the State Courts.

Knickerbocker v. *Stewart*, 253 U. S. 149, at p. 160.

Besides, the two agreements considered and construed in the *Hust* case were maritime contracts involving power conferred upon a government agency under Congressional laws and constitutional provisions referring to a system of law co-extensive with and operating uniformly in the whole country.

Union Fish Co. v. *Erickson*, 248 U. S. 308, at p. 313.

Moreover, the United States was a party to both agreements. This alone makes the Supreme Court's interpretation binding on all courts. In the most recent case on the subject, *S. R. A.* v. *Minnesota*, 90 L. Ed. 663, at p. 667, 66 S. Ct. 749 (decided March 25, 1946), the Supreme Court says (p. 754):

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally determined by this Court."

The cases on this point are legion, and the principle is so well settled that we shall not labor the point further.

Taking up the other contentions of the New York Court separately and stated seriatim they are:

> (a) The respondents did not operate the ship and any failure on its part to perform duties assigned to it by the United States in connection with repairs to the ship was "strictly non-feasance" for which it was answerable to its principal, the United States, and not to the petitioner.

The statement by the New York Court that the respondents did not operate the vessel in itself betrays the reason for its erroneous decision. "At the time of the injury, *the vessel was in port and was not being navigated.* Therefore the important question here is who maintains the vessel while in port, manages its business, furnishes supplies, loads and discharges its cargo, which required the services of the petitioner. As to respondents' complete control of these functions there was at no time any dispute. The New York Court, in its own opinion, cites some of the relevant powers of the respondents, putting them in complete charge of the vessel's business. The State Court seemed to be concerned only with the "operation and manning" of the vessel, which was not alone determinative here.

As to the New York Court's finding that the private operator owed no duty to the petitioner under its contract with the Government, and that the violation of its agreement which caused the injury was "strictly non-feasance" for which it was answerable only to its principal, the United States, the Court either overlooked entirely the Supreme Court construction of the General Service Agreement in the *Hust* case, or altogether declined to follow it.

It is clear that the New York Court made three errors in applying the rule that an agent is not liable to third persons for acts of omission. The first error was in its failure to follow the interpretation of the General Service Agreement as laid down in the *Hust* case, making the "operating agent" a principal, and its holding that the common law rules of "private agency" do not apply. This point we shall discuss *infra*. The second error was the fact that it did not take into consideration the exception to the common law rule of agency, because it does not apply in maritime cases where the so-called agent was under a legal duty as in the *Brady* case. The third error is an additional exception to the common law rule in cases where the so-called agent is an agent of the Government.

This exception is derived from English law and has been consistently followed, until now, in the State of New York. The rule is that where a contract is authorized by law, as it is here by presidential directive and acts of Congress, the agent is performing a public duty and, therefore, his contract with the Government is deemed to inure to the benefit of every individual interested in its performance. The failure of the respondent to perform according to its agreement, where non-performance would subject the Government to the payment of damages, makes the defendant liable on its contract for such non-performance to an injured third party.

In the leading case of *Robinson* v. *Chamberlain*, 34 N. Y. 389, the Court said, at page 392:

> "The principle he derives from the English authorities, and in which he concurs is, 'that whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign is deemed to inure to the benefit of every individual interested in its performance.' Id, 163."

The above case is also authority for the holding that an agent of the Government working under a contract pursuant to law assumes a duty to the public. If he is not to be regarded as a public officer in all respects; it is at least true that certain public functions which the United States would be obliged in the instant case to perform, as owner of the vessel, makes him a public officer for that purpose.

To the same effect see:

Little v. *Banks*, 85 N. Y. 258.
McMahon v. *Second Ave. R. R. Co.*, 75 N. Y. 232, at pp. 235, 237.
Restatement of the Law of Contracts, Sec. 145.

This was indeed the test that was applied by this Court in the *Hust* case when it held that the respondent's fallacy was that "it assumed the case would be controlled by the common law rules of *private* agency". A public agent is held to a higher degree of responsibility as shown *supra*.

A search for the *raison d'etre* of the rule shows that the theory upon which at common law an agent is not personally responsible to third parties for not doing something he ought to have done is that, having agreed with no one but his principal to perform them, in failing to do so he wrongs no one but his principal, who alone can hold him responsible, provided, of course, that no law imposed any duty upon him (Mechem On Agency, 2nd Ed., Vol. 1, Sec. 1464). Quite apart from the fact that the rule obviously does not apply to public agents, the rule, by its own limitation, is inapplicable in maritime cases because as to seamen and persons doing seamen's work on board a vessel the law imposes warranties of the seaworthiness of the vessel and its appurtenant appliances and equipment (*Mahnich* v. *Southern*, 321 U. S. 96; *Seas Shipping Co.* v. *Sieiacki*, 906 Ed. 809, 66 S. Ct. 872). Furthermore, the rule is not applicable here because:

(a) The private operator owed the petitioner a legal duty;

(b) The private operator was acting as a public agent performing a public duty;

(c) The private operator was performing under a maritime contract involving power conferred by the President and by Acts of Congress, to be interpreted not by State law but by Federal law;

(d) The private operator owed its performance thereunder not to a private principal but to a government, to wit: the United States, so that the petitioner was also interested in its performance.

The Court in the *Hust* case held the private operator not to be an "agent" in the generally accepted sense under the common law which would make an agent not liable to third persons for acts of omission.

The Supreme Court held the private operator liable as a principal, saying at pages 1226-1227 (66 S. Ct. 1218):

> "Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common-law rules of private agency. * * * No such application of the common-law 'control' test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life'."

The above finding was clearly based on the *principalship* of the operating "agent" and, indeed, it is the Court itself which puts quotes on the word "agent" (p. 1226). The finding that Hust was an employee of the respondent and that the respondent was the employer *pro hac vice* with the Government emphasizes the conclusion of principalship.

These conclusions are reached by the Court from its interpretation of the General Service Agreement and the functioning of the private operator under it. It follows from these findings that when the New York Court applied the common law rule of agency, to wit, the rule of nonfeasance, it was clearly an erroneous application of a common law agency rule to a case involving a principal.

In *Militano* v. *U. S. A.*, 156 F. (2d) 599, the Circuit Court of Appeals (2d Cir.), in a case, as here, involving a longshoreman, drew the proper legal conclusion from the finding in the *Hust* case that the operating agent was an employer of the crew. At page 602 the Court said:

> "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro*

hac vice in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor. *Grillo* v. *Royal Norwegian Government*, 1943 A. M. C. 1357, 139 F. (2d) 237, 238 (2 CCA): see *Pioneer S. S. Co.* v. *McCann*, 170 Fed. 873 (6 CCA); *Glover* v. *Compagnie Generale Transatlantique*, 1939 A. M. C. 695, 103 F. (2d) 557, 559 (5 CCA), cert. den. 308 U. S. 550, 1939 A. M. C. 1419."

The next contention of the New York Court is:

> (b) The *Brady* case is not authority for the petitioner's position because in that case the vessel was being operated under a different form of agreement with the United States, which agreement, unlike the instant case, required the agent to man and operate the vessel.

The above holding of the New York Court will not stand analysis. To begin with, the Supreme Court, in the *Hust* case, called the differences between the two agreements "meticulous" and distinctly stated that these differences "make it hardly more than dubious that the respondent did not stand *pro hac vice* as employer with the Government" (p. 1228). After reciting the duties of the operating agent under the service agreement, the Court proceeds to say (p. 1230) (66 S. Ct. 1218):

> "With so much of the former relationship thus retained and so little additional risk thrown on the operating agent, it would be inconsistent not only with the prevailing law, but also with the agreements' spirit and general purpose * * * for us to rule that he (petitioner) was deprived of his long existing scheme of remedies. * * * *"

The Court's emphasis above on the "spirit" of the agreement, and its biblical quotation that "the letter killeth" and its quotes on its use of the word "agent" when referring to its use in the service agreement, and its finding of the differences between the two agreements as "meticu-

lous" are significant in interpreting the decision that the petitioner shall have his general maritime rights unimpaired.

The concurring opinion, restating the same idea, says (pp. 1232-1233):

> "The difference in words in those cases and the present one does not, on a view of the entire situation mark a difference in functions of the private operator."

Besides, like the petitioner Caldarola, Brady was a business invitee. The New York Court overlooked the fact that the Brady contract in providing that the private steamship company "operate and man" the vessel played no part in the decision of the Court. The vessel involved there, as here, was in port. In the *Hust* case, the Court strongly intimates that there would be no question of the private operator's liability had the case involved "evidence of negligence" showing "that respondent had failed to perform any duty in outfitting the ship or otherwise in relation to the delinquencies alleged to have constituted causes of the injuries" (Note No. 11, p. 1221). Significantly enough, the dissenters hold the same view. In the *Brady* case, the question was less complicated than in the *Hust* case because there was little doubt that when the vessel was in port the private operator had control of the vessel to perform its contractual obligation to "equip, victual, supply and maintain the vessel"—a duty that is present in the standard contract as well as in the General Agency Service Agreement (Art. 3(c)). Its power to "man and operate" was likewise not involved for the injured party was not a seaman, and the vessel was not being navigated. There was no question of negligence of the crew. There was involved, however, the negligence resulting from a defect in equipment, to wit, a ladder used by the intestate in boarding the vessel. The *Brady* decision fairly implies that it was the private operator's duty to furnish a ladder

without defects to its invitees. It was part of the ship's equipment. This conclusion is clearly based upon the duty of the private operator to furnish a ladder without defect, as here the respondent should have furnished a boom without defect.

The Court there held that (1) an agent is liable for his own negligence; (2) the fact that by its agreement with the United States Maritime Commission the steamship operator is exonerated has no binding effect on a third person not a party to the agreement; (3) the rights of principal and agent *inter se* are not the measure of the rights of third persons against either of them for their torts; (4) if Congress intended to exonerate agents they must say so in unmistakable terms.

The rationale of the rule in the *Brady* case is clear as in *Caldarola;* there was no overt act. Both agents under a contractual obligation to "furnish and maintain" permitted the defective equipment to remain on the vessel. The negligence was passive. The New York Court called it "nonfeasance", observing that the agent is exonerated because its obligation inured only to the benefit of the Government, and not to the invitee. That is the nub of the decision by the New York Court. If that decision prevails, then obviously it is in direct conflict with the *Brady* case.

In the *Hust* case the majority as well as the *dissenting minority* of the Court make clear that in cases like the one at bar, the questions determined there are not involved for the reason that, while in port, there is no question of "operate and man", and points out that as to other responsibilities both agreements were, in effect, alike.

The majority says (p. 1234) (66 S. Ct. 1218):

> "Whenever, in such cases, it might be found that technically the Government is the employer, the necessary result would be to remit the seaman to the 'exclusive' right to sue under the procedure provided by the Suits in Admiralty Act. In short the combined

effects of that Act and of the transfer of American shipping to governmental control, for the temporary period of the war, would be to confine merchant seamen altogether to suits under the Act, *except in the cases of men employed on vessels under time-charter and possibly as to injuries incurred by others through the general operating agent's failure to discharge some specific duty imposed by the General Service Agreement while the vessel is in port.* * * *" (Italics ours.)

The Court's footnote says:

"Such as, e.g., failing to provide needed repairs or supplies, but not including any act attributable to negligence on the part of the master or other members of the crew."

The Supreme Court of Oregon, in holding that Hust was not entitled to recover under the Jones Act, took care to point out that the ruling would be different if the negligent act were attributable to the manner of discharging any duty which the respondent owed while the vessel was in port. That language was confirmed by this Court verbatim. With that rule there was no disagreement in the *Hust* case by the dissenters. So, for instance:

"There is no reason here why the petitioner should not sue respondent for its alleged tort. What petitioner is attempting is to hold respondent liable as employer for negligence of petitioner's fellow servants of petitioner's superiors or the Master under the Merchant Marine Act * * *" (p. 1238).

And again:

"Certainly Hust did not lose his remedies against the agent for the agent's torts. He still has those remedies but petitioner wishes to hold the agent as an employer * * *" (p. 1238).

What torts could Hust have sued for without relying on the Jones Act? Obviously, they could only be those

breaches of obligation which were the Agent's responsibility. The most applicable obligations under the Agreement were Article 2 of the Agreement, whereby the General Agent promises to manage and conduct the business for the United States, Article 14, which provides that the Agent shall arrange for repairs of the vessels and all machinery, tackle, and "to maintain the vessel in a thoroughly efficient state of repair and condition", and Article 3A, subdivision (c) "Equip, victual, supply and *maintain* the vessels * * *". The words "*maintain* the vessels" could obviously only refer to maintaining the vessel and all its appurtenances and equipments, such as tackle and appliances, in a reasonably safe condition.

It is perfectly apparent that the various provisions in the instant contract cast a definite obligation upon the General Agent to do those things which the Government, in its far-flung activities during the war, could not do, and had, as of necessity, to rely upon the experience and the know-how of these private steamship companies.

The New York Court, recognizing the obligation of the Agent to perform these various functions, nevertheless holds that a violation of those contractual obligations was "strictly non-feasance", and exonerates the Agent from liability so far as the longshoreman is concerned. If the New York Court of Appeals' position is tenable, then Hust could not recover against the Agent under the General Maritime Law or even under the common law in a case where he never urged the Jones Act. To illustrate. Let us assume that Hust was injured while the vessel was tied up to a pier and, instead of being injured through an act of a fellow servant, he had walked over a covered hatch and fallen by the breaking of one of the hatch covers which was defective. That, we assume, is the type of tort for which Hust could recover against the Agent, as pointed out in the dissents quoted above. The New York Court, on the other hand, would hold the obligation to maintain proper hatch covers is an obligation inuring only to the benefit of the Government, and not to Hust. Such a con-

clusion obviously is fallacious if we take the standard of the *Brady* case and both the majority as well as the dissenting minority opinion in the *Hust* case.

Furthermore, the very use by the New York Court of the words "strictly non-feasance" is inept, under the circumstances.

In *Ellis* v. *McNaughton*, 76 Mich. 237, the Court defines misfeasance as follows:

> "Misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the *not* doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable. Mecham Ag., Sec. 572." (Court's italics.)

See also:

Dudley v. *Community Public Service Co.*, 108 F. (2d) 119.

Significant, indeed, is the language from 2 American Jurisprudence, page 254, Section 325, which we set forth:

> "On the other hand, an agent who violates a duty which he owes to a third person, that is a duty extending beyond the principal to the third person, is answerable for such consequences whether the act be an act of malfeasance, misfeasance or nonfeasance. Stated in this form there is probably no case to be found to the contrary. The attempt to work out the liability of the agent to the third person on the basis of the distinction in terminology indicated, rather than upon the exact nature of the duty which the agent owes the third

person, has aptly been described as a 'solemn legal jugglery with words'. Indeed, some courts, while stating the rule that an agent is not liable to a third person for nonfeasance, hold the agent liable for 'misfeasance' though the act is wholly one of omission."

The New York Court then concludes with the following:

(c) The *Hust* case did not apply because the majority opinion held only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the "General Agent". It was only the concurring minority who held that the General Agency Service Agreement the agent was in possession and control of the ship and, therefore, such holding was not binding on the New York Court as the majority opinion.

The above holding of the New York Court was prefaced by the statement (p. 466):

"In that case (*Hust*) the Supreme Court reversed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who unlike the present plaintiff, was a seaman. The 'General Agency' contract made between the United States and defendant in the Hust case was identical with the contract of the present defendants' with the government. But Hust's suit was brought under the 'Jones Act'."

While the factual distinction is true, it is, notwithstanding, also true that when a longshoreman, like the plaintiff, is engaged in a maritime service formerly rendered by the ship's crew, as here, he is to all intents and purposes a seaman. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50.) The fallacy lies in the implication that, while it is admitted that the contract in the *Hust* case is the same as in the instant case, the construction of the contract is somehow inapplicable because the *Hust* suit was under the Jones Act.

The last word on this subject (April, 1946), the Supreme Court in *Seas Shipping Co.* v. *Sieracki,* at pages 879-880, says (66 S. Ct. 872):

> "* * * for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."

In the above case, as here, Sieracki, a stevedore, was injured by a boom which was supported by a defective shackle, while he was aboard ship. He was employed by an independent stevedoring company under contract to the shipowner to load the ship.

The difficulty with the New York Court's position is that it failed to recognize that the Supreme Court's construction of the service agreement with the Government in more ways than one applies equally to longshoremen as to seamen. It, in fact, applies as well to all persons having business on the vessel. This Court went to great length to compare the contracts in the *Brady* case and Hust agreement, and found them functionally alike. The *Brady* case was that of a custom officer. In that case Brady, too, was an invitee and the Court held that the case involved maritime rights even though the Jones Act was not involved.

Furthermore, the New York Court failed to recognize that the finding in the concurring opinion that the operating agent had the management of the vessel, as well as possession of it from the owner, the United States, thus making the respondent owner *pro hac vice,* was a finding restating in its own terms the finding of the majority of the Court. The concurring opinion was not a concurrence on grounds other than those of the majority opinion. The concurring judges distinctly state that they "add a few words" to "the result we have reached" as two of the majority justices to show that such result "is consonant with the traditional rules of liability" (p. 1233).

Even the dissenting justices in attempting to answer their prevailing brethren said (p. 1238): "It is suggested that the respondent may be in the position of a charterer or owner pro hac vice, etc." There would be no point in answering a concurring minority holding.

The term "owner", when used in connection with a vessel, includes more than the nominal owner and extends to all those who exercise substantial control over the vessel. Where the charter merely provides for the use of the vessel with possession and management retained by the owner, the charterer incurs none of the liabilities of an owner or operator. On the other hand, as here, the agreement provides that possession and management shall be transferred to the operator, then the operator becomes the owner *pro hac vice*, for the duration period and is fully subject to the duties and responsibilities of ownership (*U. S.* v. *Shea*, 152 U. S. 178; *Leary* v. *U. S.*, 10 Wall. 591; *Reed* v. *U. S.*, 11 Wall. 591).

In line with these decisions, the majority opinion, in analyzing and construing the two contracts and setting up alternatives and objections, first accepted the Oregon Court's conclusions that Hust was only "technically" the employee of the United States for the purposes of "ultimate control" in the performance of his work. Although the differences between the two agreements were "meticulous", it made its own finding on this basis that it was "hardly more than dubious that respondent did not stand *pro hac vice* as employer with the Government" under the service agreement. The majority opinion then proceeded to construe the service agreement according to its "spirit", not the "letter". It found little difference from "the mere fact that the terms of the standard agreement were changed to omit the provisions of manning the ship". This difference was relied upon by the New York Court in refusing to allow the *Brady* case as authority here. The Supreme Court, on the other hand, said: "If this made them technically and temporarily employees of the United States it did not sever altogether their relation to the operating agent . . .".

The majority opinion then further proceeded to make its own analysis of the agreement and pointed out some of the paragraphs in the service agreement that invested the private operator with the indicia of *pro hac vice* ownership, such as the hiring of the master and crew through the usual channels, retaining the role of paymaster, having the contractual duty to manage and conduct the business of the vessel assigned to it, the acceptance of the vessel and its duty to maintain the vessel in efficient state of repairs, its being indemnified against personal injuries, etc., thus finding management and possession of the vessel which are equal to the finding of the concurring opinion that the respondent is owner *pro hac vice* with the Government.

On the question of proof of *pro hac vice* ownership, the case at bar has developed even stronger evidence. The War Shipping Administration, in its own communications, regulations and directives to the respondent, used such phrases as "vessels operated by your company", "vessels assigned and delivered for operation under General Agency Agreement", "both at sea and in foreign ports", "masters have been instructed to report all breach of discipline to operating agent", and "all masters and officers in your employ".

The standard and uniform practice adopted by the Government and all private steamship companies with whom it enters into these agency agreements is that as soon as a Liberty ship is completed it is delivered at the shipyard to the operating agent who signs a formal receipt for the vessel, in which receipt the agent certifies that the named vessel owned by the United States was on a given date, at a given hour, at a given port, delivered to the private operator (naming it), under the service agreement, giving the number of the agreement and its date, and continues to say "having on board fuel, water, stores and equipment as per inventories taken on the date of delivery".

Of course delivery of the vessel is already fully set forth in the service agreement and in it is also a provision for

its return to the Government upon the termination of the agreement; but the above is a required formal receipt and, in addition, there is a formal receipt for the ship's gear. That is how the Government itself makes sure that possession of the vessel is delivered.

Possession of the vessel and its management are the two prerequisites for ownership *pro hac vice*.

FINAL POINT

The judgment of New York Court of Appeals should be reversed and such action taken by the Court as is appropriate.

Respectfully submitted,

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Attorneys for Petitioner International Longshoremen's & Warehousemen's Union.

Of Counsel:
JACQUIN FRANK,
ARTHUR LEONARD ROSS.

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MAY 2 1947

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 625.

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Defendant,

and

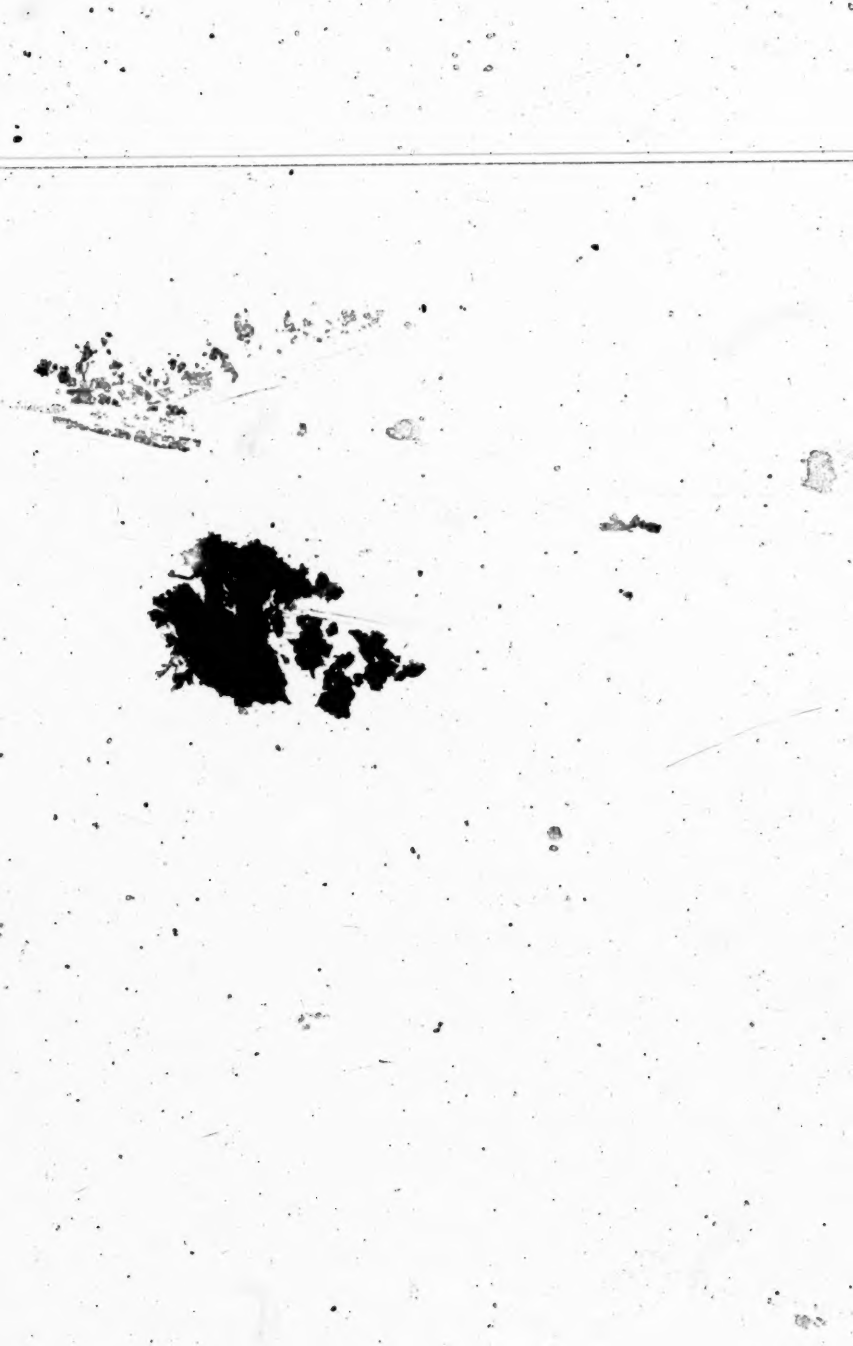
GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO., (Defendants-Respondents in the Court below),

Respondents.

REPLY BRIEF FOR RESPONDENTS, THOR ECKERT & COMPANY.

CLETUS KEATING,
VERNON SIMS JONES,
RAYMOND PARMER,
Attorneys for Respondents, Thor Eckert & Company.

Rapidprint Press, Inc., 22 Thomas St., New York 6, N. Y., U. S. A.



INDEX.

PAGE

POINT I.—In reply to the second point of the brief of the United States 1

POINT II.—Further answering the questions of Mr. Justice Black 17

POINT III.—Further answering the questions of Mr. Justice Rutledge 32

APPENDIX 42

TABLE OF CASES.

Angelus Milling Company v. *Noonan*, 144 F. 2d 469, aff'd 325 U. S. 243 40

Appel v. *Mueller*, 262 N. Y. 278 6

Bailey v. *Zlotnick*, 133 F. 2d 35 5

Brady v. *Roosevelt Steamship Company*, 317 U. S. 575 ..... 24, 25, 26, 27, 28, 30, 31

Cullings v. *Goetz*, 256 N. Y. 287 6

Hudson v. *Moonier*, 102 F. 2d 96 3

Hust v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 18, 29

Mollino v. *Ogden*, 243 N. Y. 45 6

Oliver v. *Bercano*, 267 A. D. 747, aff'd 292 N. Y. 93 6

Pulco, Admx. v. *H. E. Moss & Company and Todd Shipyard Corporation*, ... F. 2d ..... decided by C. C. A., 2nd Circuit, on February 20, 1947 6

Quinn v. *Southgate Nelson Corp.*, 121 F. 2d 190 ..... 25, 26, 30, 31

Roberts v. *U. S. S. B. Emergency Fleet Corporation*, 240 N. Y. 474 30

PAGE

Shea v. *Export S. S. Corp.*, 253 N. Y. 17 30

United States v. *Leahy*, 145 F. 2d 462 40
United States v. *United Mine Workers*, ... U. S. ....., decided March 6, 1947 21
United States Lines Company v. *United States of America*, 52 Supp. 758 40
United States Shipping Board Emergency Fleet Corporation et al. v. *Lustgarten*, 280 U. S. 320 30

Van Winkle v. *American Steel Boiler Insurance Company*, 52 N. J. L. 240 4

STATUTES.

Federal Tort Claims Act, 28 U. S. C. 931 31
16 U. S. Code 457 6
Merchant Marine Act of 1936, 46 U. S. Code 1195-1197 ..... 26, 27, 28

OTHER AUTHORITIES.

Compilation of Standard Contract Forms of the War Shipping Administration, United States Government Printing Office, Washington, 1945 ..... 34, 38
1 Mechem on Agency, 2nd Edition, 1914, p. 1093 ..... 3, 5
Restatement of the Law of Agency, §354, Comment D 9
Restatement of the Law of Agency, §387 4
Restatement of the Law of Agency, Tentative Draft No. 6 9
Senate Report No. 898, 74th Congress, 1st Session 22, 23, 28
Smith & Betters "United States Shipping Board, Its History, Activities and Organization," 1931 26

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Respondents.

REPLY BRIEF FOR RESPONDENTS, THOR ECKERT & COMPANY.

POINT I.

IN REPLY TO THE SECOND POINT OF THE BRIEF OF THE UNITED STATES.

The United States supports respondent's position that it was not in physical control of the *SS Everagra.* It goes on, however, to contend that, nevertheless, respondents may be held liable to the petitioner because of an alleged failure to perform a supposed contractual obligation in

respect of keeping the boom in sound condition. It is contended that the contractual obligation was owed, not only to the United States, but to the peititoner.

The United States is mistaken.

A. *The mistake with respect to whom the duty, if any, was owed.*

The contractual duties which the respondents owed to the United States were not owed to the petitioner. The cases and other authorities cited by the United States do not support the thesis that they were.

On the contrary, the authorities cited by the United States actually support respondent's thesis—*i. e.*, that, in the absence of a legally significant relationship (status), such as employer-employee, etc., duties for the non-performance of which there may be liability in tort depend on control. The point which the United States has missed is that such control may be of two kinds. On the one hand, there is control of premises and, on the other, control of acts or activities. An agent may be in control of premises for his master. He may also be in control of acts and activities for his master. Whereas his control of premises for his master does not make him an occupier of premises, since he is acting in a representative capacity, nevertheless, his control, under such circumstances, may be regarded as an act to the same extent as his control of other acts and activities. Failure to act properly when one is in control, whether it be of activities or premises, and irrespective of whether one is an agent or not, is a tortious *act*.

The cases relied upon by the United States at page 22 of its brief are all cases where liability was founded on such negligent *acts*. They involved persons who were in control of premises or in control of activities.

At the same time, the authorities cited by the United States recognize that there is nothing tortious in the mere failure of an agent, or anyone else, to keep a promise, whether it be a promise to repair or a promise to do anything else.

Thus, *Mechem*, cited by the United States, at page 22 of its brief, puts the matter succinctly, as follows:

> "For similar reasons, the agent should be held responsible for injuries caused by his neglect to keep in repair premises *under his control* where he is charged by his principal with the duty to repair and has the necessary means, in any case in which he would be liable for the same injury *if he were controlling the premises on his own account.* In these cases in which the agent has both the duty (to his principal) and the power to repair, and fails to do so, the injury can fairly be regarded as the consequence *of his own act.* If an agent would be responsible for negligently driving his principal's team against a third person, as he would undoubtedly be, is he any the less responsible because he negligently fails to guide the team or negligently permits it to go unguided or negligently leaves it unattended and injury thereby results? *If the agent is not in control* or has neither the duty nor the power to repair, *the failure to repair cannot be regarded as his act.* But where these conditions are present it is difficult to see why it is not properly to be regarded as his *act.* It is, of course, in one sense a not-doing, a nonfeasance; but *his act of control is a doing,* a feasance, and his failure to properly control is a misfeasance, if any importance is to be attached to these terms."
>
> 1 *Mechem on Agency,* Second Edition, 1914, p. 1093. (Italics supplied.)

Thus, in *Hudson* v. *Moonier*, 102 F. (2) 96, cited by the United States at p. 22 of its brief, the court said at page 98:

"Under Missouri law a third party has no right to maintain an action for injuries resulting from a breach of contract between two contracting parties. (citing cases)

"In the last cited case it is said: 'The violation of a contract will not, as such, furnish a basis for liability in tort, but the act which violates the contract may be a negligent one which creates such liability.' "

In all of the cases cited by the United States at page 22 of its brief, it was not the contractual obligation on which the tort liability was founded. The principle involved is illustrated clearly by *Van Winkle* v. *American Steel Boiler Insurance Company*, 52 N. J. L. 240, cited by the United States at p. 22 of its brief, wherein the court held that the defendant did not have any obligation at all to inspect a steam boiler and discover its defects. Nevertheless, the defendant was held liable because it had actually inspected the steam boiler on many occasions, and had approved it as being free from defect. Here, again, it was negligent action with respect to an activity within the control of the defendant which was the basis of liability.

Section 387 of the Restatement, quoted on page 21 of the United States' brief, makes the agent's "entire charge" of the premises—*i.e.*, control—the basis of the agent's liability.

Control is one of the fundamentals of tort law. If there be no relationship or status to which the law affixes duties, and there is no control, there can be no liability for failure to act, whether the defendant be an agent or not.

The only significance which an agent's contract—*i.e.*, promise—can have is that, in a case where the agent is in control, it may determine the extent to which the agent should go in exercising such control carefully. In other

words, an agent in control, who has agreed with his principal to perform certain acts, must, in the exercise of reasonable care, achieve the standard achieved by agents similarly situated—*i.e.*, those who have made similar commitments. Thus, even though the agent be in control of his master's premises, if the agent has neither the power nor duty to make repairs, he is not liable if injury is caused to someone because the repairs are not made. 1 *Mechem on Agency*, Second Edition, 1914, p. 1095. Similarly, if the agent is in control, but performs all the duties which the principal requires of him, he is not liable. See *Bailey* v. *Zlotnick*, 133 F. (2) 35, a decision by Mr. Justice Rutledge.

The rule that, in the absence of a legally significant relationship (status), liability for negligence is founded on control, is not a "local rule in New York", as the United States indicates at page 20 of its brief. It is the equivalent of the distinction between a contract and a tort. If the rule were to be abandoned, the distinction between a contract and a tort would have to be abandoned.

There is a basic reason why a failure to perform a contractual duty cannot be a ground for tort liability. A contractual duty is as variable as the intentions of the parties to the contract, not only as they may be expressed at the time of first contracting, but also, as subsequently modified. By reason of this variability, a contractual undertaking is not a satisfactory standard for regulating conduct. Thus, it is comparatively easy to grasp the meaning of the phrase "reasonable diligence" when used as a part of the definition of those duties for the non-performance of which there is tort liability. On the other hand, it is impossible to know what two contracting parties may have meant by using the same phrase.

New York law is in entire accord with the cases cited by the United States at page 22 of its brief. See

Mollino v. *Ogden*, 243 N. Y. 450, where an agent in charge of the management of a building was held liable for failure to perform a duty of repair which he had contracted to perform. But, there, as in all such cases, wherever they may be decided, the agent was in control although in a representative capacity, and, being in control, he was liable for his acts.

See also *Oliver* v. *Bereano*, 267 A. D. 747, aff'd. 292 N. Y. 93, where the defendant which contracted to repair an automobile was held liable to a person injured because the repairing was performed negligently.

Care should be taken to distinguish cases such as *Appel* v. *Muller*, 262 N. Y. 278, wherein was involved the historic liability of owners of property to persons on the highway caused by the condition of the premises. Such liability continues even though the owner is out of possession provided he retains a right of entry for the purpose of repair.

Thus, the New York courts correctly stated in the case at bar not only the New York law, but also the general law throughout the United States. This case, in principle, is just like that of *Cullings* v. *Goetz*, 256 N. Y. 287, which holds that neither an agent nor anyone else is liable for failure to make repairs to premises which he does not control.

At all events, if there is any difference between New York law and the maritime law, it is the former which must prevail, because the accident happened in the State of New York in navigable waters, and because a statute requires it. See 16 U. S. C. 457, as construed in the case of *Puleo, Adm'x* v. *H. E. Moss & Company and Todd Shipyard Corporation* ..... F. (2d) ..... decided by the Circuit Court of Appeals for the Second Circuit on February 20, 1947.

The United States cannot, in logic, maintain that the General Agent was not in control of the vessel, and, yet, was liable for negligently exercising control of the vessel. The two are mutually exclusive.

The General Agent either was in control, or he was not in control of the vessel. If he was not in control, as the United States rightly maintains in the first point of its brief, then, there can be no liability in tort for the mere failure to perform a contractual obligation to the United States.

It is significant that the petitioner does not assert in his brief that the respondents are liable for the mere failure to perform a supposed contractual obligation to the United States. Petitioner rests his claim on an assertion that the respondents had control. Petitioner's Brief, p. 23. Petitioner refers to this control as a limited control or a "measure of control". Petitioner's Reply Brief, p. 4. In adopting this phraseology of uncertain meaning, petitioner is really claiming, as indicated at the time of the argument, that respondents had "just enough" control to warrant the reversal of the judgment.

However, if the United States had control, as the evidence in the case shows,* and the master exercised that control on behalf of the United States, and all that the General Agent had was an implied right to go on board the vessel in order to perform his duties when, as, and if permitted by the master to do so, the agent did not have any control

* Again we challenge the statement made by the petitioner in the first paragraph of page 20 of his brief, wherein he says that "not a single order, direction, or request was ever made by the United States Government or the War Shipping Administration directly to any officer or member of the crew of any vessel operated under the General Agency Agreement." We refer to Directive No. 2, entitled "To the Masters and Officers of All Vessels of the United States Merchant Marine", which appears at page 29 of the *Compilation of Orders, Rules and Regulations of the War Shipping Administration.*

at all. Instead, he had only what the Appellate Division and the Court of Appeals held that he had—a right of access to the ship. *Additional Papers to the Court of Appeals, p. 10.* This is not control.

The General Agent had no more control than a local plumber would have who might make a contract with a householder to inspect and keep in repair the plumbing of a house. Actually, the General Agent did not have as much, for, as we shall show, the General Agent's contract was not "to inspect and repair", but, essentially, to cooperate with certain servants of the United States in inspection and to report to other servants of the United States as to what the inspection disclosed. However, if the plumber should never visit the house at all, it could not be said that he controlled even the activity of inspection and repair. Even though he should visit the house on occasion, and then engage in the activities of inspection and repair, he could be said to be in control of only those things which he did, or failed to do, on such visits.

Petitioner's case rests solely on the naked claim that the respondents had a duty and authority to visit the ship for the purpose of making inspections and repairs; that this duty and authority, whether exercised or not, was the equivalent of giving some control of the vessel to the General Agent; that, since the Agent had such control, the duty of inspection and repair was owed to third persons; and that the mere happening of the accident shows that the duty was not performed.

It is this misconstruction of the meaning of control which is at the bottom of petitioner's argument. The Appellate Division and the Court of Appeals pointed it out. To be sure, it is not the only error affecting petitioner's claim. However, it is fundamental and sufficient to justify the dismissal.

There is one further ground of liability on which the petitioner relied in the Appellate Division, but which, apparently, he has now abandoned, since he has not mentioned it in his brief in this court. However, the United States has resurrected it. We refer to Restatement, Agency, Section 354, cited at page 22 of United States' brief.

Therein, it is said that if an agent undertakes to perform an obligation which his principal owes to a third party to provide the latter with protection, the agent may be held liable if the third party is injured because of a failure to provide protection.

The liability referred to herein does not seem to be supported by the decided cases. It seems to be the creation of the drafters of the Restatement, who have frankly admitted, in this instance, that they were not re-stating the law as it was, but as they wished it were. See Tentative Draft No. 6, pp. 209, 210. Furthermore, the Restatement makes it clear that the liability in question does not result from an agent's contract with his principal. Restatement, Agency, Section 354, Comment d. Although the factual situation is one which is reminiscent of *Laurence* v. *Fox*, actually, the legal principles are not related at all to that case. Instead, the supposed duty results from the undertaking of one person to substitute for another. The supposed tort lies not in failing to give the agreed protection, but in depriving the injured person of the protection which he would have had from the person who was obligated to give it. The rationale is either that of tortious interference with an existing relationship or the establishment of a new one to which the law attaches duties.

It has no application in this case. The respondents did not undertake to perform the obligations of the United States. They undertook merely to inspect and report so

that the United States could satisfy itself as to the condition of its ships. R. 349. They did not undertake to inspect and report so that they might be made safe for anyone. The trial court so charged. R. 307. There is nothing in the entire record to show that the United States relied on its General Agents to prevent injuries, either to members of the crew or to others. The uncontradicted evidence is that the vessel's crew was charged by the United States with the duty of seeing that the boom was kept in a proper condition and of discovering its defects, if any. R. 156, 157, 147.

B. *The mistake with respect to the nature of the duty owed by the General Agent.*

The United States is also mistaken in its contention that the respondent was in exclusive charge of maintaining and repairing the Steamship *Everagra,* and had a corresponding duty to make regular inspections to ascertain and discover defects and to have them promptly and properly repaired. See pages 18 and 19 of United States' brief.

In support of its contention, the United States offers a letter written by the General Counsel of the Maritime Commission which, it says, "authoritatively" analyzes the duties of a General Agent with respect to inspection and repairs. See page 19 and Appendix of United States' brief.

The so-called analysis is not evidence of administrative practice of which this court may take judicial notice. It is no more authoritative than the analysis of any lawyer who pleads the cause of his client. As to motivation, see page 25 of United States' brief. In this instance, it so happens that this statement of the "official" position is not in accord with the actual practice followed by the local representatives of the War Shipping Administration in this case.

In this point we shall demonstrate wherein the United States has been misinformed.

All of the obligations of the General Agent, as set forth in the General Agency agreement, depend upon the *orders* of the United States. This does not mean written orders. It means oral orders, as well. R. 337, R. 351, 352. The General Agency contract provides as follows at R. 351:

> "Article 17. • • • In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given."

Thus, the General Agent's undertaking to "maintain" the vessel (R. 338); "to arrange for the repair of the vessel" (R. 349); and to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained" (R. 349) required the General Agent to do these things as ordered by the United States. See also the testimony of the witness, Rough, at R. 225, 226.

It was important, therefore, in the trial of this case, to know what orders had been given by the United States in this respect, and respondents proved these orders. The proof was from the mouth of the Assistant General Manager of the War Shipping Administration's Maintenance and Repair Division in New York. This was the head office of the Maintenance and Repair Division. See Administrative Order No. 50, at page 2 of Compilation of Orders and Regulations. This person testified, pursuant to arrangement made with his superiors in Washington, that

the primary duty of making inspections in order to discover defects was that of the master and crew of the vessel, and that the General Agent's duties began with an examination of the requisitions prepared by the crew, *i.e.*, the heads of the departments of the ship, such as the chief officer, chief engineer, and chief steward. R. 147, 148, 156. The inspection which the War Shipping Administration required of the General Agent was that it should examine the ship in the light of these requisitions, and determine which items of the requisitions were necessary. R. 147. For this purpose, it was customary for the General Agent's representative to go on board the ship in company with the War Shipping Administration's representative, and to make that determination. R. 147.

Furthermore, Maintenance and Repair Regulation No. 1 (R. 358), makes all of the duties of the General Agent with respect to inspection and repair relate to repairs which are "required" by a ship. The respondents contended below, and they contend here, that the word "require" as so used, means *requisition*. That is the primary meaning of the word, and the testimony of the Assistant General manager of the War Shipping Administration bears out the contention.

There is no doubt that under the General Agency contract the War Shipping Administration could have ordered the General Agent to make further inspections of its ships. The General Agent had agreed to make such inspections as it was *ordered* to do. There is no proof in this record that the United States ever gave any orders to the General Agent to make any inspections other than those referred to by its Assistant General Manager.

The United States now seeks to repudiate the testimony of this representative of the War Shipping Administration

given during the trial of this action. United States' brief p. 25. It is said that his testimony "does not correctly reflect the official position of this agency". It is submitted, that the "official position" of the Maritime Commission is irrelevant. The question is what "orders" the War Shipping Administration's local representatives actually gave its General agents.

As evidence that the testimony of its representative on the trial was the truth, we refer to the Maintenance and Repair Regulations as revised on December 15, 1944, and made effective as of January 15, 1945. These were marked in evidence on the trial as defendant's Exhibit M. R. 447. They were later withdrawn from evidence because it was thought that, since they had not been issued as of the time when the accident happened, they might mar the record if permitted to remain. R. 244. However, when, as now, an issue is raised by the United States as to what orders it gave, and the United States displays a willingness to go outside the record, Exhibit M has an undoubted relevance, and this court may take judicial notice of it.

These Maintenance and Repair Regulations, although issued after the accident, constituted a codification of the Maintenance and Repair Regulations which had been issued up to the time of their issue. R. 444.

In Part 3, among the formal requirements, the following appears:

> "3.1 . *Specifications for repairs.* General Agents shall obtain the vessel's requisitions for repairs from the deck, engine and steward's departments, and in order to prevent delay shall when conditions warrant use these requisitions as preliminary specifications. When the anticipated expenditure is not in excess of $10,000.00, representatives of the agents shall without reference to the Division of Mainte-

nance and Repair prepare the specifications for work in accordance with the job order classifications outlined in Sec. 3.2. A representative of the Division of Maintenance and Repair shall attend when repairs exceed $10,000.00 and when preparing defense or damage specifications. Whenever the estimated cost of work exceeds the agent's prescribed limitation, the agent shall notify the Local Manager of the Division of Maintenance and Repair. The contract shall then be awarded in accordance with Sec. 2.2."

In Part 10, with respect to foreign repairs and salvage operations, the following appears:

"10.11 *List of required repairs.* The masters and chief engineers will have prepared prior to the arrival of their vessels at the Canal a detailed list of the repair items that will be required, segregated by classification number in accordance with S. 3.2. An original and five copies shall be prepared.

"10.12 *Clearance of items for repair* (a) Subsequent to the arrival of the vessels at the Panama Canal, the repairs lists will be discussed and screened, item for item, jointly by the vessels' General Agents or subagents, masters and chief engineers and War Shipping Administration representative. A Classification Society representative should be present in the event seaworthiness or classification is involved."

"10.13. *Arrangements for repairs.* (a) The final Approved Repair List, signed by the Master, Chief Engineer and War Shipping Administration representative, shall be turned over to the vessels' agents or subagents, who shall make all of the necessary arrangements with the Panama Canal authorities for the actual undertaking or the work and its completion. It shall be the direct responsibility of the Masters or Chief Engineers to oversee and supervise to a satisfactory completion all work performed on

> the vessels. The Approved Repair Lists shall become permanent records of the repair histories of the vessels, the originals and copies of which are to be handled as hereinafter prescribed. The agents or subagents, together with the Masters and Chief Engineers, shall be given unlimited cooperation by the War Shipping Administration representative in their endeavors to expedite the satisfactory initiation and completion of the necessary repairs."

The so-called "official position" of the Maritime Commission is not in accord with the facts. The facts are that the War Shipping Administration relied primarily upon the heads of the departments of its ships for inspection and discovery, and directed the General Agent to confine himself to a determination of whether the requisitions of the crew were proper or not.

The testimony of the assistant general manager of the Maintenance and Repair Division given on the trial was fully in accord with the facts and the administrative practice as shown by the regulations. It should not be disregarded at this late date because of statements as to administrative practice made in an appendix attached to a brief of the United States filed as *amicus curiae* in the Supreme Court.

C. *The mistake as to the alleged default by the General Agent.*

So far as the evidence shows, there was no default by the General Agent with respect to any of the duties which it owed the United States. Article 14 of the General Agency contract provided, in substance, that the General Agent should inspect and report. R. 349. There is no evidence that it did not. For all that appears, the General Agent may have inspected and reported to the United States that

the boom was defective and the United States decided not to do anything about it. It would not be the first time that this occurred.

As proof, we submit copies of correspondence passing between War Shipping Administration and United States Lines Company, a General Agent, with respect to the Steamship *Exterminator*. These consist of a letter written on August 19, 1943, by W. N. Westerlund, Assistant Deputy Administrator for Ship Operations to Mr. R. T. Lemon, Director Maintenance and Repair Division, 39 Broadway, New York, which we have marked Exhibit A, and a letter, dated August 23, 1943, written by G. A. Dundon, Manager Charterers and Agents Division to United States Lines Company in New York, which we have marked Exhibit B. These and other documents will be submitted in a booklet which will accompany this brief. As these letters show, the War Shipping Administration was fully informed that the Steamship *Exterminator* was badly in need of repairs. For good and sufficient reason, it decided not to make them, but to lay the vessel up in the James River. But, first, the vessel had to proceed from New York to the James River, and solely by reason of the determination of the War Shipping Administration, she sailed from New York in an unrepaired condition.

It so happened that a seaman was injured by reason of this state of unrepair.

Both the petitioner and the United States have mistakenly assumed that proof that the boom was defective was the equivalent of proof that the General Agent was negligent in its duties. When control of inspection and repair is vested exclusively in one person, it is, of course, a permissible inference that such a defect is the result of such person's negligence. But such an inference has no founda-

tion whatever when one person has a duty to inspect and report, and another person has the function of determining whether repairs shall be made or not. In such a case, one cannot tell whether the default lies in a failure to inspect or in a failure to take adequate steps after the function of inspection had been fully performed. This is, essentially, the situation in the case at bar, because there is no evidence with respect to the General Agent's alleged negligence, except that he had a duty to cooperate with other servants of the United States and that an accident happened because *some one* did not do his duty.

POINT II.

FURTHER ANSWERING THE QUESTIONS OF MR. JUSTICE BLACK.

I.

Mr. Justice Black asked on the argument whether the General Agency Contract's provision for compensation to the General Agent was dependent on the amount of the cargo which the ship carried.

Our answer follows:

It was not. Article 5 of the General Agency Contract. (R. 342) provides as follows:

> "ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously

existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942."

The proviso contained in the above article has no application to this case because the *SS. Everagra* was not allocated until March 27, 1943. R. 355. Therefore, the compensation of the General Agent in this case was entirely within the discretion of the War Shipping Administration.

II.

Mr. Justice Black asked whether those who drew up the General Agency Contract intended to "defeat" a plaintiff's right to a jury trial—*i.e.*, to eliminate as a possible defendant the General Agent against whom a jury trial might otherwise have been had, and, thus, leave available for suit only the United States which was suable only in Admiralty. Our answer follows:

Undoubtedly, this was their intention as respects those cases in which it was asserted that the General Agent was liable merely because, as alleged, he operated the vessel. They intended Government operation and this was a necessary consequence of Government operation. Therefore, they intended it in some cases.

But, they did not intend it as respects cases in which it was asserted that the General Agent was liable because of some negligent act committed by him in his capacity as a non operating agent of the United States. Although Government operation was intended, it was also contemplated that the Agent would be liable for his negligent acts and suable for them, either in admiralty or at common law, at the election of the injured party. Cf. *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, at 748.

Thus, it was intended that an injured party should have a jury trial in some cases, but not in others.

Essentially, the question asks whether the parties intended the necessary consequences of their acts. Of course they did. The answer follows as night follows day.

If they had intended to preserve a right to sue the General Agent as an operator, they could not have intended Government operation, for the two could not co-exist. If they did not intend to preserve a right to sue the General Agent as an operator, they must have intended Government operation, because that was the only way in which they could effectuate their intention.

Therefore, the premise that they intended that the General Agent should not be suable as an operator requires the conclusion that they intended Government operation.

The suggestion that they intended private operation, but constructed a false front of Government operation for the purpose of saving the private person from a jury trial is without support either in the evidence or in common sense. What possible interest could such chicanery serve? If the elimination of a jury trial was a desideratum, it was easily attainable. All that was necessary was to have actual government operation. Why bother with private operation at all if, in order to attain the elimination of a jury trial, such hocus pocus would be required?

We assume that a personal injury litigant's right to trial by jury is a resultant of the kind of operation involved, and that, in this case, it depends solely on what the United States and the General Agent actually intended and did. If private operation is involved, the plaintiff has a right to a jury trial against a private party and no one can defeat it. If Government operation is involved, he does not have that right, and no one can give it to him.

Correspondingly, we assume that a determination as to the kind of operation involved does not depend on the desire of the personal injury litigant for a jury trial, nor on the desire to satisfy it.

Mr. Justice Black's questions respecting jury trials also embraced the motives of the parties—i.e., whether, in providing for government operation, they were motivated by a desire to eliminate the General Agent as a possible defendant in a jury trial. As to this, our answer is as follows:

The representatives of the United States may have been so motivated. Counsel is not qualified to speak authoritatively as to the motives of the United States in choosing Government operation rather than private operation.

The private interests were not so motivated. It should be obvious that they could not have had such a motive. The private interests were motivated by the desire of avoiding *all suits* against themselves as operators, whether they involved jury trials or not. If they were not going to run the show, they did not want the burdens which go with running it. On the other hand, if they were suable as operators, there was no way in which they, being private parties, could prevent being sued in any forum chosen by the plaintiff.

Mr. Justice Black also inquired as to whether the *sole* motive of the United States in choosing Government operation was to eliminate the agent of the United States as a possible defendant in a jury trial. At the time of the argument counsel could not answer this, but now, after inquiry, is in a position to do so. The answer follows:

It was not the sole motive. The motives of the United States were, primarily, the result of the war in which it was then engaged, and in which the vessels were an im-

portant factor. Direct Government operation was more advantageous to this end than indirect private operation. Direct Government operation preserved the immunity of the vessels in foreign countries. It also relieved them of the burden of regulation and taxation by local governments. It achieved speed, secrecy and efficient operation. It enabled the United States to directly control fueling, supplying, repairing, and similar services. It enabled the United States to directly control the routing, navigation, and physical management of the vessels. It carried out the mandate of the President, who had ordered the War Shipping Administration "to control the operation * * * and use of all ocean vessels".

This is fully set forth in a letter written by the General Counsel of the Maritime Commission to the Assistant Attorney General and dated April 28, 1947, which has been printed as an appendix to this brief. Appendix *infra* pp. 42-66, 47.

Most important of all, as respects the matters with which we are concerned herein, it appears that the United States believed "that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States" appendix, p. 51. Not only did the Unions give a nostrike pledge, which they would have been reluctant to give to private operators, but they kept their pledge and there were no strikes in the American Merchant Marine during the war.

A similar Government policy with respect to coal miners was involved in the recent case of *United States* v. *United Mine Workers*, decided March 6, 1947.

The foregoing objectives motivated the United States in choosing Government operation rather than private

operation. In view of this, it would seem that the motive of eliminating jury trials, if it existed at all, was comparatively insignificant in producing the result.

Thus, the court may dismiss from further consideration the suggestion that the United States arranged with private interests for the private operation of its wartime fleet, and engaged in a conspiracy with its agents to hide the facts behind a false front of Government operation. There was true Government operation with all the consequences that such operation entailed.

III.

Mr. Justice Black asked also whether there are any differences of a substantial nature between the General Agency contract and previous contracts between the United States and its agents.

Our answer follows:

There is such a difference, and it is in respect of a matter to which Mr. Justice Black attaches great importance. We refer to the provision for the payment of compensation for the services of the General Agent.

As already shown, the General Agent receives as compensation whatever sum the United States chooses to give. R. 342. Out of this sum he has to pay his administrative and general expenses. What is left is the actual compensation.

Compare this with the situation up to 1930, as disclosed by Senate Report No. 898, 74th Congress, 1st Session, prepared by Mr. Justice Black when he was a member of the Senate. The contracts at that time provided that the agent should be paid: "all voyage expense and also • • • a fixed percentage of the gross revenue". Report No. 898, p. 4. Subsequent to 1930, and up to 1935, when the report

was submitted, the agents received as compensation lump sum payments for every voyage. Report No. 898, p. 5.

With respect to these provisions, the Senate Report said, at page 4:

> "the losses were the taxpayers' and the Government's, the operations and the profits were, by and for private interests".

And, at page 39:

> "In the past, control of wages, salaries, working conditions, and profits of business subsidized by the United States has been vested in private individuals. In other words, while the Government has supplied, during the past decade, far more than 50 percent of the capital of enterprises engaged in foreign shipping, as the investor of the greater portion of this capital, it has not had that management and control which private investors would have had under the same circumstances."

And, at page 40:

> "As heretofore stated, Government losses persistently described by selfish interests as arising out of Government operations, have really resulted from private operations in the form of subsidized operating agreements variously called 'managing-operator agreements', 'lump-sum agreements', and 'mail contracts'. Under all of these, the private operators took the profits and the Government took the losses."

It is evident that those who wrote this report were of the opinion that the money received by the agents as compensation for services was actually the profits of a profitable business. Consequently, the operation was referred to as private operation. Just what they would have termed it if there had been a profit to the United States

after paying the agent's compensation, we need not pause to inquire. At all events, it was by regarding the operation in the light of its *results* that the Senators came to the conclusion that it was private operation.

We are not now concerned with the validity of that conclusion. We are concerned with showing that the facts on which it was based were entirely different from the facts attending the General Agency contract here. The General Agent obtains as compensation only what the United States chooses to give. If he does not like it, he can quit. If the United States thinks he is receiving too much or too little, it can change it at will.

This is not the way that profits are made by private interests. But, it is an excellent way for the United States to keep complete control of all profits, if profits there be.

Furthermore, compare the General Agency contract with the contract involved in the *Brady* case. *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575. That contract was made pursuant to the Merchant Marine Act of 1936, which was enacted after Senator Black's report. Therein, it was provided that the managing agent should receive his expenses only. And that is all he received. *And, furthermore, there was a profit over and above the expenses and it went solely into the pockets of the United States.*

For the year 1937, the profits were $531,370.44. For the year 1938, which was the year when Mr. Brady had his accident, the profits were $654,941.76. For the year 1939, the profits were $597,537.54.

This can be proved, if necessary. For the moment, we refer to a letter written by Roosevelt Steamship Company, Inc. on April 11, 1947, a copy of which is included among the exhibits in the booklet of exhibits accompanying this brief. It has been marked Exhibit C.

That was one of the reasons why we maintained in the *Brady* case that government operation was involved therein. It was operation for government profit, and it resulted in such profit. The agent did not receive a nickel above actual expenses. In the langauge of the economists, the United States was the entrepreneur.

In the *Quinn* case the Circuit Court said: (121 F(2) 190, 191):

> "We think our opinion in United States Shipping Board Emergency Fleet Corp. v. Greenwald, 16 F. 2d 948, which held a managing agent with similar powers liable for the death of a seaman, is applicable here, although in that case the managing agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons."

Thus, the Circuit Court, in effect, said that it made no difference that the managing agent in the *Quinn* case had no interest in the profits. Likewise, it made no difference to the Circuit Court that the compensation of the managing agent was relatively small (actually, it was nil). Mr. Justice Black, however, said on the argument that the method of payment of the agent *was* an important circumstance in determining who was the operator. It would seem that this is in disagreement with the view expressed by the Circuit Court of Appeals in the *Quinn* case. It is, therefore, gratifying to note this apparent difference of view and what appears to us to be support from Mr. Justice Black of our position that the General Agent was not an operator of the vessel, because, among other things, he did not and could not participate in the profits.

IV.

Mr. Justice Black also asked whether Senate Report No. 898, 74th Congress, 1st Session, did not refer to the contract involved in the *Brady* case as one providing for private operation.

Our answer follows:

It did not. Senate Report No. 898 was submitted before the contract in the *Brady* case was drawn. The report was dated 1935, and the *Brady* contract was not drawn until after 1936, pursuant to the authority of the Merchant Merchant Marine Act of 1936.

The contract referred to in Senate Report No. 898 was the so-called "Lump Sum Operating Agreement 1930", reproduced in Smith & Betters, U. S. Shipping Board, Its History, Activities, and Organization (1931) page 292. Paragraph 8 of that Agreement provided:

> "The managing operator shall, *at his own expense,* man, operate, victual, navigate, fuel and supply the vessels, and shall pay all port charges, pilotage, taxes, and other costs and expense."

The *Brady* contract was a special case. See United States brief, p. 7, note 6. It was a temporary arrangement designed to assist the Maritime Commission in operating in a route which was expected to be unprofitable. But, it became profitable, and the United States took the profits.

The law which was in force at the time that *Brady* contract was drawn provided that, where private operation was intended, it should be effected by means of a bareboat charter or demise. 46 U. S. C. 1195, 1196, 1197. By no stretch of the imagination could the contract in the *Brady* case be called a bareboat charter or demise. A bareboat

charterer is always an entrepreneur. In the *Brady* contract the Government took the entire risk of loss and the entire profit. It would seem to follow from this circumstance, alone, that the contract provided for Government operation.

The essential difference between the *Brady* case contract and the General Agency contract is that, in the case of the former, the United States operated the vessels *indirectly*, whereas, in the case of the latter, it operated them *directly*. Under the *Brady* case contract, such control as the Managing Agent exercised was exercised in his representative capacity only, and not as an employer. The Managing Agent, notwithstanding such control, was no more the employer of the crew than was the master, who also exercised control in a representative capacity. On the other hand, under the General Agency contract, the General Agent did not exercise any control of the vessel at all because all control was taken away from him by the terms of the contract and the orders of the United States.

The Merchant Marine Act of 1936 was passed in response to the recommendation made by Senator Black in Senate Report No. 898, at p. 41, that there be an end of operation of United States vessels by means of subsidies granted to private interests. The Senate Report recommended that "unless it be considered (as we consider it) in the public interest to provide for Government ownership and operation, that the system adopted provide for Government ownership with private operation."

Thus, Senator Black was, in a sense, the progenitor of the Merchant Marine Act of 1936, which provided primarily for private operation, and, secondarily, for Government operation, and of the contract in the *Brady* case which exemplified the latter.

If one disregards Senate Report No. 898 and the Merchant Marine Act of 1936, it is natural to regard the contract in the *Brady* case as the lineal descendant of the subsidy contracts which antedated it. So regarded, the contract in the *Brady* case will, inevitably and wrongly, appear as a subsidy contract, and the operation provided for therein may be referred to, mistakenly, as private operation.

In view of Mr. Justice Black's direct connection with the events leading up to the contract in the *Brady* case, such a result involves more than a mere mistake in the construction of a contract. It involves a denial of the paternity of Mr. Justice Black's own brain-child.

In this connection we refer to the two following paragraphs which we have found on page 39 of Senate Report 898:

> "True Government operation implies that the business is conducted without hope or possibility of private individual profit and with complete Government control of the wages, salaries, working conditions, and activities of those employed therein. In such Government operations, if there is profit it inures to the taxpayer, and if there is loss it is borne by the taxpayer.
>
> True private operation implies that private individuals supply the capital and operate and control the project for private profit, stimulated by the hope of profit to operate frugally and efficiently."

Tested by these standards, wartime operation as provided for in the General Agency contract was Government operation and nothing else. The General Agent did not have any hope or possibility of profit. The Government, in one way or another, controlled wages, salaries, working

conditions and the activities of all persons employed on its vessels.

In respect of the Steamship *Everagra*, which was a Panamanian vessel, (R. 72), the War Shipping Administration did this by means of Operations Regulation No. 69, issued on August 9, 1943. A copy of this Regulation, consisting of seven pages, is included among the exhibits in the booklet already referred to, and is marked Exhibit D. This Operations Regulation is in evidence in this case, pursuant to stipulation entered into at R. 298. It should end all controversy as to who physically controlled the *S.S. Everagra* and who employed the crew. We do not refer to the so called "technical" employment of the *Hust* case. We mean actual employment.

V.

Mr. Justice Black asked whether there had not been repeated attempts to cloak private operation as Government operation for the purpose of avoiding jury trials against private parties.

The answer follows:

We have already shown that this did not occur with respect to the General Agency Contract involved in this case. Brief, pp. 18-22. We now deal with the situation as it existed in the years before the General Agency Contract was drawn up.

Such a thing never occurred. There never was any occasion for it.

For many years the United States has been arranging for both private and Government operation. When it wished private operation, the United States used bareboat charters. When it wished Government operation, it used agency

agreements. Some agency agreements were drawn obscurely. In such cases it was difficult to know whether Government or private operation was intended. Therefore, the only way of ascertaining what was intended by the contract was to take evidence as to what the parties actually did thereafter. *Roberts* v. *U. S. S. B. Emergency Fleet Corporation*, 240 N. Y. 474.

If jury trials had depended on whether private operation or Government operation was involved, and anyone had had in mind avoiding a jury trial, surely a lawyer could have been found who could have done a better job of clearly providing for Government operation than was done in the contracts referred to.

But, jury trials did not depend on whether Government operation or private operation was involved. The Government operation of those days was by a wholly Government owned corporation, the Emergency Fleet Corporation. In the 1920's it was customary to sue this corporation, which was suable both in admiralty and at common law before a jury. In such actions it was customary, for good measure, to join the agent of the Fleet Corporation. No one cared whether the private agent was suable or not before a jury because the Fleet Corporation was always present, suable before a jury, and paying the bills. For an example, see *Shea* v. *Export Steamship Corp.*, 253 N. Y. 17, where counsel for the respondents here, then represented the plaintiff who was a seaman. From 1930, when the *Lustgarten* case (280 U. S. 320) was decided, until 1948 when the *Brady* case (317 U. S. 575) was decided, private parties were immune from suit. At least, everyone thought that they were, and proceeded, accordingly, to sue the United States in admiralty, pursuant to the Suits in Admiralty Act. It was not until the *Quinn* case was decided in 1941, 121 F. (2d) 190, that it

ever occurred to anyone that any attention should be paid to the provisions of the contract between the United States and its agents.

The *Quinn* case represents the old story of hard cases making bad law. If the tort in the *Quinn* case had been maritime, Mrs. Quinn could and would have sued the United States under the Suits in Admiralty Act, and there would never have been any occasion for holding that the agent of the United States was operating the vessel and, therefore, liable. But, as it happened, Mrs. Quinn's husband had been killed when the vessel struck a bridge on which he was standing, and Mrs. Quinn could not sue the United States under the Suits in Admiralty Act because it was not a maritime tort.* Therefore, she sued the agent, and the essential question was whether Mrs. Quinn was to receive any compensation at all for her husband's death. A result favorable to Mrs. Quinn was accomplished by holding that the agent was the operator of the vessel. In the opinion of those who were immediately concerned with the question, this was contrary to fact, and required correction. Two attempts were made to correct it in this court, but this court declined to decide the question. The only other way in which the error could be corrected was to make future contracts so clear in their meaning that the same mistake would not be repeated. This was the reason, in part, for the meticulous phraseology of the General Agency contract.

By the same token, it was certain careless and obscure phraseology contained in the *Brady* contract, which was the same as the *Quinn* contract, which led to the mistaken conclusion that it provided for private operation.

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* Cases involving non maritime torts, such as in the *Quinn* case, are now taken care of by the Federal Tort Claims Act, 28 U. S. C. 931.

This is all there is to it, and, even though our adversaries might wish to satisfy groundless suspicions, it is impossible in this instance to do so.

POINT III.

FURTHER ANSWERING THE QUESTIONS OF MR. JUSTICE RUTLEDGE.

I.

Mr. Justice Rutledge asked whether Article 16, in conjunction with Article 14, might have an important bearing on the question of who was in control of the *SS. Everagra.* The substance of Article 16 is as follows:

> "The United States shall indemnify • • • the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand whether or not the claim or demand be found to be valid) • • • for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands • • • for claims for damages for personal injury or loss of life and claims for maintenance and cure."

Article 14 requires the General Agent to "arrange for the repair of the vessels" and also to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any

inspections or investigations that the United States may deem desirable."

Our answer follows:

We gather that the significance which Mr. Justice Rutledge may see in the foregoing lies in the following words from Article 16: "arising out of, or in any way connected with, the operation or use of said vessel". Mr. Justice Rutledge seemed to emphasize this at the time of the argument.

We agree with Mr. Justice Rutledge that it is inferable from the provision for indemnity that the parties contemplated that there might be claims against the General Agent arising out of or connected with "the operation or use of said vessels". But, we do not think that it is inferable either from this or other words of Articles 14 and 16 that the parties contemplated that the operation was to be by the General Agent.

On the contrary, Article 16 reflects the fact that the parties contemplated that, notwithstanding that the operation was by the United States, claims might be made against the General Agent as if he were the operator when, nevertheless, he was not. This the parties indicated when they provided for indemnity with respect to counsel fees in defending invalid claims. This they also indicated when they provided for indemnity for claims arising out of the "performance by the General Agent of any of its obligations hereunder". The latter was all-embracing so far as the General Agent's own liabilities were concerned. The General Agent could not have a liability which did not arise from the performance of his obligations. It follows, therefore, that, when the parties referred to claims connected with the "operation or use of said vessels", they were referring to claims made against the General Agent, but

arising out of the operation of the vessel by the United States, and particularly the expenses of defending such unfounded claims.

In this connection reference should be made to the contract which the United States had with the Berth Agent, Moore-McCormack Lines, Inc. At pages 20 and 21 of our main brief, we have referred to the fact that, at the time of the accident, the agent which had charge of the United States' interests with respect to berthing and loading the *SS. Everagra* was not Thor Eckert, respondents herein, but Moore-McCormack Lines, Inc., the Berth Agent. A copy of a Berth Agent's contract is found at page 367 of the Compilation of Standard Contract Forms of the War Shipping Administration, which is in evidence in this case as Plaintiff's Exhibit 7.

The Berth Agent, it will be seen, undertook to "conduct the business of vessels assigned to it by the United States from time to time" Article I. It also undertook to "Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the United States as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels; or in the absence of such orders, the Berth Agent shall follow reasonable commercial practices;" Article 3A(a), Plaintiff's Exhibit 7, page 368.

Furthermore, it was provided in Article 8 that "The United States shall, without cost or expense to the Berth Agent procure or provide insurance against, or shall assume all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage

caused to other vessels, persons or property, and shall defend, indemnify and save harmless the Berth Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance." Plaintiff's Exhibit 7, page 370.

Here, again, one may entertain the mistaken idea that a provision for indemnification implies a liability arising out of operation by the Berth agent. Furthermore, if one is attracted by labels, rather than by substance, one can be misled by the words of the preamble of the Berth Agency contract wherein the Berth agent is referred to as an operator or Berth operator. Plaintiff's Exhibit 7, page 367. However, in view of the fact that, necessarily, there were as many Berth Agents with respect to each ship as there were ports at which each vessel loaded, it can be seen readily that the suggestion that a Berth Agent was an operator in the commercial sense involves the absurdity of a multiplicity of operators. The choice, therefore, is between two alternatives:—either the ships were physically operated by General Agents and as many Berth Agents as there were ports at which they loaded cargo, or, as we contend, by the United States with the assistance, as to business matters, of the General Agents and as many Berth Agents as the United States chose to employ. Since the first alternative is absurd, the second must be true.

II.

Mr. Justice Rutledge asked whether there had been any instance where the United States had shown bad faith in responding to its obligation to indemnify the General Agent.

Our answer follows:

We know of no instance of bad faith. But, the good or bad faith of the United States is not exactly relevant to the point which counsel was endeavoring to make on the argument. That point was that the General Agent, even though he had a contract of indemnity with the United States, and even though he was insured, had a very practical interest in not being held liable at all.

If the United States, acting either as indemnitor or insurer, refuses to indemnify or insure, on grounds asserted as adequate by the United States, it makes no difference to the General Agent whether the representatives of the United States are acting in good faith or not. The result is the same. Moreover, if the representatives of the United States indicate from time to time that, on such occasions, and on such grounds as may seem appropriate to the United States, they will deny indemnity, the General Agent's position, to say the least, is uncomfortable.

Counsel made the statement on the argument that the United States had already indicated that a contract for indemnity with the United States is not such a "gold bond" as it appears to the uninitiated. General Agents have a substantial interest, not only as respects plaintiffs, but as respects the United States, in being held not liable as operators, and, therefore, not subject to the risk of having their claims for indemnity denied whenever it suits the United States to do so. As proof of this, we offer the following

copies of letters which passed between the United States and one of its General Agents, United States Lines.

The first is a letter written on March 30, 1945, by the Department of Justice to the United States Lines with respect to claims arising out of the explosion of the *SS. Quinault Victory,* which took place at Port Chicago on July 17, 1944. It is marked Exhibit E and is contained in the booklet of Exhibits already referred to. In the fifth paragraph of this letter the United States coolly offered to defend the General Agent in proceedings pending in Portland, Oregon, but, so to speak, with its fingers crossed. The United States specifically undertook to do this "without prejudice to whatever situation is disclosed as the defense develops".

Attention is also called to the next to the last paragraph, wherein the United States, so to speak, washes its hands of the General Agent in case it should appear that the General Agent was "liable for its own torts".

An ordinary commercial underwriter would never dream of providing for the defense of its assured on such a basis. Ordinarily, when a commercial underwriter takes over the defense of his assured, all questions as to coverage are waived. But, not so with the United States. The United States, undisturbed by the conflicting motives necessarily involved, undertook, on the one hand, to be the lawyer for the General Agent in defending him against the claims of third parties—i.e., in asserting that he was not negligent—while, at the same time, it reserved to itself all advantages which might result to the United States from a finding that he was negligent.

The next letter is a letter written by the Department of Justice on August 23, 1945, with respect to the same matter. It is marked Exhibit F. We call attention to the fifth para-

graph, wherein the United States again took the position that the Government would be released from its contractual indemnity in case "a trial might produce evidence that your company's servants were negligent in some one or more respects named in the contract."

The same considerations apply to insurance policies. It is all very well to say that a General Agent has nothing to worry about, whether he is held to be the operator or not, since, in any event, an insurance company will pay the bill. But, it is not so simple as that.

The conclusion that the General Agent is fully protected by insurance rests on the blithe assumption that insurance companies are generous and willing victims. This is contrary to fact. Whether a General Agent or anyone else has valid insurance which will result in adequate reimbursement is a question which cannot be stated generally, but can be stated specifically only with respect to each individual case. Furthermore, it can not be stated at all until one has examined the policy.

It so happens that the policy is in evidence in this case. It will be found in Compilation of Standard Contract Forms of the War Shipping Administration, Plaintiff's Exhibit 7, page 807 *et seq.* It will be noted that the insurance in question is not simply insurance of the General Agent, but insurance of "The United States of America, acting by and through the Administrator, War Shipping Administration, and its General Agents and Agents under Service Agreements, Berth Agents and Sub-Agents acting on their behalf, and Owners, hereinafter collectively called the Assured". Plaintiff's Exhibit 7, page 807. It will be noted also that the insurance indemnifies "the assured against any loss • • • by reason of the fact that the assured is the owner or bareboat charterer, or the General Agent or

agent, or berth agent, or sub-agent of the owner or bareboat charterer of the insured vessel". Plaintiff's Exhibit 7, page 808.

This insurance does *not* insure against many of the liabilities arising out of the operation of vessels. It is not designed to do so. True, it is designed to cover most of the liabilities arising out of operation of vessels, but there are a number of them which are not covered at all. We will cite just one to prove the point—*i.e.*, liabilities to persons, not members of the crew, while they are on piers alongside of which the vessel may be docked. This is not shipowners' liability within the meaning of the policy, and, yet, the shipowner, may be liable to persons on the dock who are using it as a means of access to the ship.

There is no doubt that when the insurance was provided for in the contract it was contemplated that the General Agent might have liabilities for which there should be insurance. No one doubts that, insofar as a General Agent may be guilty of a negligent *act* in respect of the performance of any of the services required of him under the General Agency Agreement, he may be liable therefor. The insurance in this case which insures him only "by reason of the fact that the assured is the * * * General Agent" was designed to cover such liabilities and no other.

Thus, the General Agent has a real and substantial interest in maintaining the position, which is the true position, that he was not the physical operator of such United States-owned ships as the *Evcragra*. The uncertainty of his ultimate financial position is derived not only from the fact that he is insured as a General Agent—what does that mean? —as from the fact that the insurance which has been provided is incomplete, and, thus, leaves him uninsured with respect to substantial matters. If anyone should take the

risk in respect of these matters, it should be the United States, which is the actual operator, and not the General Agent, who is not.

At the present time suits for personal injury are pending in which the insurance company has denied coverage of the General Agent, although the liability of the General Agent, if it exists at all, arises out of service performed for the United States as required by the General Agency Contract. If the General Agent should be held liable, his only possibility of recoupment will be by means of suing the insurance company after his liability is established, or by way of indemnity from the United States, which, as already shown, may also lead to litigation.

As to the necessity for litigation in order to collect from the United States on its written promises to pay insurance claims, see *United States* v. *Leahy*, 148 F. (2d) 462. See also *United States Lines Company* v. *United States of America*, 52 F. Supp. 758.

In the first of these cases the United States claimed that its insurance undertaking was *ultra vires*. There have been at least fifty suits brought against the United States as a result of the United States' repudiation of its promise to pay in full its insurance obligations. Essentially, the defense of the United States was that the contract was made without authority. Such actions have been compromised, but not for the full amount. From the amount so received, the private interests were obliged to deduct expenses and attorneys' fees.

What has happened before can happen again.

In *Angelus Milling Company* v. *Noonan*, 144 F. 2d. 469, aff'd 325 U. S. 293, Judge Learned Hand said, at page 472:

"It makes no difference to the taxpayer what was his mistake; in either case he awakes to learn that it is never safe to put his trust in officials * * *; but he who deals with the Government must dot his i's and cross his t's, and if he assumes that he may rely on the ordinary rules which apply as between individuals, he is doomed to disappointment."

In short, the General Agent has a contract with the United States and a contract with an insurance company—*i.e.*, choses in action. These may or may not be valuable. The General Agent would be much better off if he were not liable in the first place, and were not burdened with the risk of litigation against the United States or underwriters. If, on the facts of this case, he was not the actual physical operator of the vessels, there is no reason in justice to treat him as such on the false assumption that he is fully insured and, therefore, has no vital interest at stake.

Respectfully submitted,

CLETUS KEATING,
VERNON SIMS JONES,
RAYMOND PARMER,
Attorneys for Respondents,
Thor Eckert & Company.

APPENDIX.

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

JFS:LC
61-14938

Apr. 28, 1947

Raymond Parmer, Esq.
Kirlin, Campbell, Hickox and Keating
120 Broadway
New York, New York

Sir:

Attached is a letter received from the General Counsel, United States Maritime Commission, furnishing information requested by the Supreme Court in the course of the oral argument of *Caldarola* v. *Moore-McCormack Lines et al.*, October term, 1946, No. 625.

In accordance with your request that the Department of Justice assist you in procuring this information, this letter is furnished for use as an appendix to the reply brief which you have been authorized to file in that case.

Respectfully,

For the Attorney General

JOHN F. SONNETT
Assistant Attorney General

Enclosure
No. 320713

UNITED STATES MARITIME COMMISSION

WASHINGTON

Apr. 28, 1947

Honorable John F. Sonnett
Assistant Attorney General
Department of Justice
Washington 25, D, C.

Sir:

This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc., et al.*, that the Maritime Commission, as successor to the United States Shipping Board and the War Shipping Administration, supply additional information for the use of the Supreme Court. It appears that you desire to be informed why the War Shipping Administration, instead of entering into managing-operator agreements, such as had been used by the Shipping Board and the Maritime Commission from the close of wartime government operation in 1920 until the final sale of the Government's merchant fleet in 1940, decided to adopt service agreements whereby it employed existing steamship companies as its agents to conduct the business of the vessels. You also request an explanation of the differences between the standard form service agreement GAA 4-4-42 adopted by the War Shipping Administration and the former managing-operator agreements, together with a statement as to the manner in which the vessels were operated and serviced under the various integrated contracts of the War Shipping Administration.

CONGRESS AUTHORIZED DIRECT GOVERNMENT OPERATION.

It must be understood at the outset that direct government operation of the government merchant fleet was

believed indispensable to the war effort in both World Wars. It was accordingly specifically authorized by the Congress and the arrangements which were made for direct government operation with the assistance of experienced steamship companies as ships' husbands for the servicing of the vessels and as berth agents for the handling of the port services arising out of their operations on the various routes were deliberately chosen from that point of view. As is evident from a comparison of the new standard form agreements, this type of operation constituted a significant change from the method of operating government vessels which had been in force from January 1920 until the sale of the last of the government lines in May 1940 and marked a return to the direct government operation of World War I.

The effect of the old peacetime operation, particularly subsequent to 1929, is best summarized by the Shipping Board in its Annual Report for 1929. There, in explaining the purpose of the operating agreement which it had adopted, the Board stated (p. 95):

> "By this plan, the operator assumes complete physical and financial control of the operations of the line, and the Merchant Fleet Corporation confines its activities to periodic inspections covering the maintenance of service in accordance with the contract and the physical condition of the ships. For the services of the operator in maintaining the line, a lump sum amount is paid, the amount to be determined for each line by analysis of recent operating results. This form of agreement places the managing operator upon as nearly a privately owned operating basis as is practical and should pave the way for the eventual sale of the lines."

This referred to what was ultimately known as the "Lump Sum Operating Agreement, 1930" which was considered in the reports of the Black Committee (S. Rep. 898, 74th Cong., 1st Sess.) and the Comptroller General (H. Doc. 217,

72d Cong., 1st Sess.). Its text is printed in full in Smith and Betters, *U. S. Shipping Board, its history, activities and organization*, pp. 293-302. Earlier forms are printed in S. Doc. 38, 67th Cong., 1st Sess., pp. 60-65.

The normal peacetime scheme of operation which, following the Black report, Congress directed in the Merchant Marine Act, 1936, required the Commission to arrange for the charter of the government-owned merchant fleet by private steamship companies. Section 704 (46 U. S. C. 1194) provided:

> "All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act. All vessels transferred to the Commission by this Act and now being operated by private operators on lines in foreign commerce of the United States shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided, preference to be given to present operators, and all operations of the Commission's operation by private operators shall be under such operating agreements discontinued within one year after the passage of this Act."

But in order to assure operation of lines which the Commission might deem essential, but for which it might be impossible to find private operators willing to assume the financial risk of operation under bareboat charter, Congress provided in Section 707, as amended (46 U. S. C. 1197), that the Commission itself might operate such lines through private operators under such operating agreements as the Commission might find advantageous. It was under exceptional arrangements of this character that the special operating agreements with the Roosevelt, South-

gate-Nelson and two other operating companies were continued by the Commission until final sale of the government lines in 1940. And it was these special agreements which were involved in the cases of *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate-Nelson Co.*, 121 F. 2d 190, cert. den. 314 U. S. 682. The text of the special Roosevelt agreement is printed in full in the Brady record (October Term, 1942, No. 269, pp. 21-32).

In order to meet potential war conditions Congress, by the Act of August 7, 1939, c. 555, 53 Stat. 1255 (46 U. S. C. 1242(e)), amended the Merchant Marine Act and conferred special powers upon the Commission with respect to vessels requisitioned or purchased in case of national emergency. In particular Congress authorized the Commission "to repair, recondition, reconstruct, *and operate*, or charter for operation, any vessels acquired" under such authority. By Section 4 of the Act of June 6, 1941, c. 174, 55 Stat. 244 (50 Appx. U. S. C. 1274), Congress further recognized the developing national emergency and expressly directed that any vessels acquired or made available to the Commission might be "operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest, giving primary consideration to the needs of national defense". Finally, following the outbreak of hostilities, President Roosevelt by Executive Order 9054 of February 7, 1942 (3 C. F. R. 1943 Cum. Supp. 1086), issued pursuant to the First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838 (50 Appx. U. S. C. 601), established the War shipping Administration under the direction of an Administrator, Paragraph 2 of that order directed the administrator to control the "operation, purchase, charter, requisition and use of all ocean vessels under the flag or control of the United States" with the exception of vessels under the control of the military or naval authorities. By paragraph 3 it also transferred to the Administrator all duties and authority with respect to the operation of vessels which had previously been conferred by law upon the Maritime Commission.

Purpose of Direct Government Operation.

The mandate for wartime operation thus granted the War Shipping Administration was entirely different from the peacetime functions of the Shipping Board and the Maritime Commission as directed by earlier legislation culminating in the Merchant Marine Act, 1936, and carried out by means of the operating agreements employed from 1920 to 1940. On the contrary, the type of operation authorized was analogous to the direct government operation followed during World War I by the Shipping Control Committee of the Shipping Board with the aid of the Division of Operations of the Fleet Corporation. Then President Wilson, by Executive Order 2664 of July 11, 1917, issued pursuant to the emergency provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, had conferred similar authority upon the Shipping Board to assume "the operation, management and disposition" of all vessels acquired by the United States. The Board, in its turn, by resolution of February 11, 1918 (H. Rep. 1399, 66th Cong., 3d Sess., p. 32), had created the Shipping Control Committee "empowered to manage, control, distribute and allocate all tonnage now subject or which hereafter may become subject to the control of the United States Shipping Board by ownership, charter or otherwise". And the direct government wartime operation that followed is now history (see Crowell and Wilson, *Road to France*, pp. 377-378; Smith and Betters, *U. S. Shipping Board, its history, activities and organization*, pp. 24-25, 29-30.

It should be common knowledge that the basic reason for the War Shipping Administration following a plan of operations whereby it manned and navigated the Government's vessels was the conviction that it was essential to the conduct of the war to make the navigation and physical management of the vessels afloat an exclusively government operation. But equally it was desirable to take advantage of the existing contacts and experienced personnel of steamship companies for servicing the shoreside needs and admin-

istrative affairs of the vessels and obtain the benefit of their existing agreements with the maritime unions for procuring masters and crews. From a review of the War Shipping Administration files it would seem that the following points were deemed particularly essential:

1. Insure immunity from foreign and local inspection, regulation, and taxation for the vessels and their operation.

2. Retain direct control of the routing, navigation and physical management of the vessels and of their masters and crews but not necessarily of their procurement for employment.

3. Provide a mechanism for direct control of fueling, supplying, repairing and similar services and for immunity from foreign and local regulation and taxation of such activities.

These points could be best attained only by direct government operation. Operation of the vessels by independent contractors would not fulfill the requirements.

When War Shipping Administration assumed the task of operating the Government's merchant fleet, the then existing scheme of the Government was to bareboat charter its vessels to private owners. The onset of war led to a general program of requisition and to acquisition of a vast number of vessels of all types through purchases and the stepping up of our construction program. The problem presented under these new conditions was how to carry out the mandate granted by Executive Order 9054 "to control the operation * * * and use of all ocean vessels" as a coordinated major governmental program while at the same time taking advantage of the existing organizations in the various ports which the steamship lines had created. Efficient wartime operation required speed and secrecy. It was indispensable to escape the detailed inspections, reports and accounting which foreign, and to some extent local, governments imposed on private vessel operation in

aid of their police, regulation and taxation powers. Only direct government operation would support the claim of sovereign immunity and permit escape from such delays and publicity. But efficient operation just as obviously dictated a policy of full utilization of the technical skill and facilities of shipping organizations, which had been painstakingly encouraged by the Commission's aid over a long period of years, precisely in order that they might be utilized by the public in just this type of emergency. Such organizations, developed in peacetime by private shipping companies, consist of highly skilled personnel trained to work smoothly and closely together. Their technical personnel have complete familiarity with the terminals, connecting carriers, loading and unloading conditions, as affected by port, sea and weather conditions, and with all other problems inherent in overseas transport in the various trades. They are familiar as a team with the various techniques and skills of such shore side matters as towage, wharfage and stevedoring practices, maintenance and voyage repairs and countless other minor port operating details, which, unless efficiently handled, result in substantial loss of time, money and ship-space. Such organizations also have access to a supply of ship and shore personnel as a result of their union agreements and other connections. It was obvious that the only workable solution was a two-fold division of duties: the navigation and physical management of the vessels afloat was to be carried out by ship masters acting directly as agents or employees of the United States and in exclusive control of their vessels and crews; the port services, the husbanding of the vessels and the details of shore side administration were to be carried out by existing shipping companies acting not as independent contractors but solely as agents for the United States.

The nature of such agency arrangements was especially important in connection with foreign taxation and regulation. For example, not even an act of Congress might have been sufficient to preserve immunity of the vessels if the general agents were made independent contractors and placed in possession of the vessels. Cf. *Mexico* v. *Hoffman*,

324 U. S. 30, 37. As Admiral Land stated in a circular instruction of June 10, 1942, addressed to all agents and general agents with respect to tax immunity:

> "When the forms of Service Agreements (GAA and TCA) were drafted, and later when they were approved by me for use as standard forms, it was contemplated that Agents and General Agents who executed them would act as agents for the United States, and not as independent contractors, in conducting the business of the vessels allocated to them (see Articles 1 and 2). It was also contemplated that, since the agents were authorized to make purchases necessary to the maintenance, management, and operation or conduct of the business of the vessels, the purchases would be made in the name of the United States as principal, that title to the goods purchased would vest in the United States, and that the United States, and not the Agent, would be obligated to pay the purchase price and its credit would be pledged therefor."

See also previous circular instruction, dated May 19, 1942, by the Director of Fiscal Affairs.

Of all the various aspects covered by the discussions that attended the drafting of the service agreements necessary to carry out the plan for wartime operations, the question of whether the crews were to be employees of the United States or of the general agent received most particular attention. Aside from the propriety of a Government agency, as employer, negotiating directly with labor unions or entering into collective bargaining agreements, the practical difficulties of so doing were almost insuperable due to the large number of labor organizations and the consequent variations as to wages, working conditions and other matters which existed in the maritime industry as a result of a long history under private operation. It was recognized that for at least the early years of the war, the requisitioned vessels would represent a vast majority of those under government control and the transition from

private to direct government operation could be best achieved only by arrangements which provided for a minimum disturbance of existing collective bargaining relationships. On the other hand, there was no doubt that as the general agents would not be owners nor bareboat charterers of the vessels they could not claim the benefit of the limitation of liability acts (46 U. S. C. 181 *et seq.*) as the law then stood. Compare Section 4 of the War Shipping Administration (Clarification) Act, (50 Appx. U. S. C. 1294) extending the benefits of the acts. General agents, while willing to assist in procurement, were reluctant to accept the unlimited liability which would result from the masters and crews being their agents or employees. Moreover it was believed that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States. Finally, only if the masters and crews were government employees could the United States be certain of its right to invoke sovereign immunity abroad and to insist at home that all litigation involving the navigation and management of the vessel should be in the admiralty courts where necessary wartime secrecy could be preserved.

Ultimately a plan was developed similar to that stated in Section 79, comment a, of the Restatement of Agency. It was determined that the general agent, acting as agent for the Government, should procure masters and crews to man the vessels. It was to be expressly provided that they should be procured pursuant to the applicable union agreements and in accordance with customary commercial practices. It would thus be possible to retain the advantage of existing union agreements without sacrificing the advantages arising out of the status of the masters and crews as government employees subject to the exclusive control of the United States.

1942 Forms of Agency Agreements.

Pursuant to the plan thus evolved, the War Shipping Administrator adopted forms of service agreements whereby

existing steamship companies were appointed general agents to husband vessels to be assigned to them and operators of existing steamship lines were appointed berth agents to handle the cargo activities and other port services required by vessels assigned to the routes established. Those service agreements were promulgated by the Administrator in General Order No. 21 of September 22, 1942 (7 Fed. Reg. 7561), and its supplements. An examination of the texts of the two agreements and a consideration of the complementary functions which they assign to the general agent and berth agent in attending to the service of the vessel on shore shows conclusively that neither agent is in control of the vessel but that the United States alone, as the principal both of the vessel's master and of the general agent and berth agent has full control.

The general agency agreement, form GAA 4-4-42, in effect at the time Caldarola was injured (printed in Document 4, Plaintiff's Exhibit 7, pp. 326-336), provided in pertinent part as follows:

> "Article 1. The United States appoints the General Agent *as its agent and not as an independent contractor, to manage and conduct the business of vessels* assigned to it by the United States from time to time.
>
> "Article 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States*, in accordance with such directions, orders, or regulations as *the latter has prescribed*, or from time to time *may prescribe* • • •.
>
> "Article 3A. To the best of its ability, the General Agent shall *for the account of the United States:*
>
> (a) Maintain the vessels in such trade or service *as the United States may direct;*
>
> (b) Collect all moneys due the United States • • • and account to the United States for all moneys collected or disbursed • • •;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders * * * and inspection *as the United States may from time to time prescribe;*

(d) * * * The Master *shall be an agent and employee of the United States and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall procure and *make available to the Master for engagement by him* the officers and men required by him to fill the complement of the vessel * * * *The officers and members of the crew shall be subject only to the orders of the Master.* All such persons shall be paid in the customary manner with *funds provided by the United States hereunder.*"

It was complemented by the berth agency agreement, form BA 12-29-43, in effect at the time Caldarola was injured (*ibid.*, pp. 367-374), which provided in pertinent part as follows:

"Article 1. The United States appoints the Berth Agent *as its agent and not as in independent contractor, to conduct the business of vessels* assigned to it by the United States from time to time.

"Article 2. The Berth Agent accepts the appointment and undertakes and promises so *to conduct the business for the United States*, in accordance with such directions, orders or regulations *as the United States has prescribed*, or from time to time may prescribe. * * *

"Article 3A. Unless otherwise directed by the United States, the Berth Agent in all cases shall, to the best of its ability, for the account of the United States:

"(a) Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the

United States *as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels;* • • • . .

"(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States • • •

"(c) *Provide and pay for all fuel, fresh water, stevedoring and other cargo handling expense, port charges, wharfage and dockage, pilotages, agencies, canal dues, commissions, and consular charges,* except those pertaining to the Master, officers and crew, • • • Provided, That, where the United States has entered into agreements for any of the foregoing items (such as for stevedoring and supplying fuel), the Berth Agent shall see that the items are furnished pursuant to the provisions of such agreements and shall make the necessary arrangements with the District Manager, or other representative of the United States therefor;

"(d) *Issue or cause to be issued to shippers customary freight contracts and bills of lading in the form prescribed by the United States,* and prepare manifests and other cargo documents. Where appropriate, issue or cause to be issued to passengers customary passenger tickets in the form prescribed by the United States."

In view of the fact that as to some of the vessels the same person might act both as general agent and as berth agent and the fact that vessels at times would be in ports where it would be necessary for the berth agent to perform the duties of husbanding the vessel, a certain overlapping of duties and powers was necessarily provided for. However,

none of these powers infringed upon the absolute control of the United States through the master over the navigation and physical management of the vessel. No conflicts could arise from this overlapping of duties between the general agent and the berth agent because they were avoided or resolved in practice by specific orders of their common principal the United States. The clear line of authority vested in the master from the United States as contrasted with the overlapping duties of general agents and berth agents, indicate clearly that the master was directly responsible to the United States and not to the general agent or berth agent.

DIFFERENCE FROM COST-PLUS CONTRACTOR AGREEMENT.

Analysis of the differences between the general agency agreement, on the one hand, and the agreements which turned the vessels over to private contractors for operation, on the other, confirms that the control of the navigation and physical management of the Government's vessels, as distinct from services in attending to their business on shore, was in the United States and that the general agent no more than the berth agent was permitted to have any control over the navigation and physical management of the vessels. As typical of the latter group of contracts we may take that with the Roosevelt Steamship Company, which was before the court in the *Brady* case, and the "Lump Sum Operating Agreement, 1930," which was before the Black Committee in 1935. As indicated above, the texts of both are readily available to the Court.

Article 1 of the general agency agreement expressly states that the Government appoints the general agent "as its agent and not as an independent contractor," to "manage and conduct the business of the vessel". On the contrary, paragraph 1 of the special Roosevelt agreement provides that the "managing agent" is appointed "to manage, *operate* and conduct the business of the line"; and paragraph 3 states that the vessels are allocated "for management and *operation*". The 1930 agreement em-

ployed a similar form and in addition in paragraph 14 provides that the "managing operator" shall "assume control" of the "management and *operation* of the vessels." Significantly, such provisions are carefully excluded from the general agency agreement.

Article 3A(a) of the general agency agreement provides that the general agent shall maintain the vessels in such trade as the United States may direct. The Government is thus entirely free to issue and did issue detailed orders concerning routes, voyages, cargoes, rates of freight and all similar matters. The special Roosevelt agreement, on the other hand, within the limitations of paragraphs 4 and 5, concerning the number of sailing on the precise trade routes specified and the necessity for contracting in the trade name of the line, leaves the entire operation to the contractor's discretion. Paragraph 5 of the 1930 agreement is similar in effect. Both leave the times and conditions of the sailings entirely to the discretion of the operator.

Article 3A(c) of the general agency agreement requires the general agent to "equip, victual, supply and maintain the vessels" as directed by the United States and 3A(d) requires the general agent to procure the master and crew. But it is provided that, once procured, the master "shall be an *agent and employee of the United States* and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." and that "the officers and members of the crew shall be subject only to the orders of the master". Finally it directs that they shall be paid with funds provided by the United States. No corresponding language exists in the old agreements. Paragraph 7 of the Roosevelt agreement requires the managing agent to "*man*, equip, victual, supply and *operate* the vessels." Paragraph 8 of the 1930 agreement provides, "The Managing Operator shall, *at his own expense, man, operate*, victual, *navigate*, fuel and supply the vessels, and shall pay all port charges, pilotage, taxes and all other costs and expenses." The only restriction upon the operator in the old forms is that the licensed officers and

chief steward are to be subject to the Government's approval.

Article 8 of the general agency agreement states that the United States will provide insurance against all insurable risks, including marine, war and protection and indemnity risks, "which insurance shall include the general agent and the vessel personnel as assureds." Paragraph 14 of the special Roosevelt agreement and paragraph 20 of the 1930 agreement, on the other hand, required the Government to provide all marine insurance, but required the operator to provide all protection and indemnity and similar forms of insurance which the Government may deem necessary. Protection and indemnity insurance covers the vessel's liability for personal injury to crew members and others and for damage to cargo. The function of providing it is ordinarily placed upon the party responsible for the navigation and management of the vessel. The retention in the United States, by the general agency agreement, of the function of providing protection and indemnity insurance is significant as showing that the navigation and physical management of the vessel is completely divorced from the functions of the general agent in husbanding the vessel and attending to its shoreside activities.

Article 14 of the general agency agreement provides that, unless otherwise instructed and "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States," the general agent shall "arrange for the repair of the vessels" and cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. Article 3A(e) imposes a general duty of maintenance. Paragraph 11 of the special Roosevelt agreement similarly requires the managing agent to "exercise reasonable care and diligence to maintain the vessels". But paragraph 12 of the Roosevelt agreement further provides, that the Government shall have the right "to survey any of the vessels operated by the managing agent hereunder to satisfy itself that they are being properly maintained" and requires the managing agent "to give

such representatives as the owner may designate from time to time full, free and complete access at all reasonable times to all parts of the vessels." Paragraph 9 of the 1930 agreement provides that "The Managing Operator shall, at its own expense * * * keep said vessels * * * in substantially the same condition as when delivered," and paragraph 5 reserves the right for the Government to survey the vessels at any time. Such provisions for access to the vessels although essential in the earlier agreements when the United States was not in possession of the vessels, was obviously unnecessary in the 1942 general agency agreement since the master "as agent and employee of the United States", exercising full control "with respect to the navigation and management of the vessel," would hold possession of the vessel for the United States and subject to its access at all times.

The financial arrangements for the vessels also tend to confirm that under the general agency agreement the vessels are in the exclusive control of the Government. The Lump Sum Operating Agreement, 1930, provides that the managing operator shall pay all expenses of operation and in paragraph 18 states that he "agrees to assume for his own account all losses incurred in the operation" and that any profits shall be his property. The operator's compensation is fixed by paragraph 21 at a lump sum for each voyage. The Roosevelt agreement, on the other hand, provides in paragraphs 6, 7 and 19 for an ordinary cost-plus-fixed-fee type of operation. Article 7 of the general agency agreement by contrast, not only requires the United States to reimburse the general agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," but, moreover, provides that the United States may advance moneys "to provide for disbursements hereunder in accordance with such regulations" as it shall prescribe. In fact, in accordance with the practice codified in Fiscal Regulation No. 6 (Revised), January 1, 1944, all expenses are paid directly from funds of the United States placed in special deposit accounts provided

for in the forms found at pp. 386-394 of Document 4 (Plaintiff's Exhibit 7). As compensation, Article 5 of the general agency agreement allows "such fair and reasonable amount" as the Administrator shall from time to time determine. At the time Caldarola was injured compensation was fixed by War Shipping Administration General Order No. 34, December 31, 1943 (9 Fed. Reg. 1059). The basic amount totaled $80 per day per vessel for husbanding and accounting services. General agents and berth agents performing berth or port services are also compensated by certain amounts measured by the cargo and passengers loaded or unloaded. All compensation is subject to recapture or renegotiation to the extent found to be excessive. Under both the Roosevelt agreement and the general agency agreement the losses and profits of the operators fall upon the United States. The general agency agreement, however, differs in that the agent is no longer, as in the old forms, an independent contractor, "managing agent" or "managing operator". The general agent is restricted to being a ship's husband acting merely as an agent and under detailed government control.

Operation Under the 1942 Agreements.

It is obvious from the foregoing analysis that general agents and berth agents in the operation of War Shipping Administration vessels are mere agents limited to the performance of shore side or non-navigating functions under general supervision and are not allowed the broad discretion exercised by independent contractors in control or possession of the vessels. The general agency and berth agency agreements alike made every action of agents subject to "such directions, orders or regulations" as the Government should prescribe. And in fact the various activities of the agents were subjected to control through the medium of general orders, operations regulations, traffic regulations, fiscal regulations, legal bulletins, auditing and accounting instructions, insurance instructions and

medical directives and through supervision by the War Shipping Administration with the aid of some 5,000 employees located in the principal ports, as well as at Washington. The discretion of agents is particularly circumscribed by three practices followed by the War Shipping Administration in operating the Government's merchant fleet: (1) the appointment of both general agents to render husbanding services and berth agents to render port services to the vessels, (2) the Government's execution of master contracts for the principal services and supplies needed for the vessels, and (3) the requirement of Article 3A(d) that the master be an agent of the United States and not of the general agent and the crew subject only to the orders of the master. Such practices are, of course, entirely foreign to operation by independent contractors, as well as to private peacetime operation, for in those the independent contractor or private operator enjoys unlimited discretion in the sources and methods of services and supply.

The restrictions resulting from the combined use of berth agents and general agents are many and War Shipping Administration operations bear little resemblance to peacetime operations. Succinctly stated, just as general agents are charged with the function of arranging for maintaining and supplying the vessels for the account of the United States, so berth agents are charged with the correlative function of arranging for the account of the United States the port services required at each end of the route. The general agent "husbands" the vessel, consisting principally of victualing, supplying, maintaining and repairing, while the berth agent performs "port services," consisting principally of arranging for the handling and loading of cargo. At foreign ports, moreover, the berth agent, in addition to the cargo services, arranges for all husbanding services required.

Berth agents were generally chosen for routes over which they had previously operated vessels during peacetime and had developed organizations familiar with the local problems peculiar to such routes and the conditions

of loading and discharge at their ports. They were appointed on the basis of their special competence for handling special routes. General agents were appointed on the basis of their experience in husbanding vessels. Many companies acted both as general agents and as berth agents but their functions only coincided where vessels assigned to them as general agents were operated over routes assigned to them as berth agents. The delineation of the duties of general agents and berth agents is fully set forth in War Shipping Administration Operations Regulation No. 84, but may be conveniently illustrated by an example. Thus assume that the A Steamship Company was designated general agent of the United States to husband a vessel, *S/S Eks*. At the same time it was designated as berth agent of the United States for the New York to United Kingdom route over which it had been a peacetime operator. Thereafter the A Company would act as berth agent for any vessels, no matter what general agent might husband them, which operated on its route,—both while the vessels were at New York and when they arrived in the United Kingdom. And it would do so again on their return to New York if the representative of the War Shipping Administration in the United Kingdom who had charge of re-routing directed the vessels to return to New York. When the *Eks* operated on that route, A Company, as general agent, would therefore render berth agency services to it without special designation as berth agent. Now assume the B Steamship Company was designated as berth agent for a route from the Gulf of Mexico to the United Kingdom. When the *Eks* was assigned to make a voyage to the United Kingdom from a port in the Gulf of Mexico, the B Company, the regular berth agent for that route, and not the A Company, the ship's husband, would act as berth agent for the vessel both in the Gulf of Mexico and on its arrival in the United Kingdom. And this even though the A Company, the general agent for the *Eks*, was acting as berth agent in the same port in the United Kingdom for vessels on its New York-United Kingdom route. In other words, although a

general agent is acting as berth agent in the United Kingdom for vessels from United States North Atlantic ports, it will not act as berth agent for vessels arriving from a United States Gulf port even though the vessels should be among those assigned to it as general agent. Conversely, the B Company, acting as berth agent for the Gulf of Mexico-United Kingdom route, and not the A Company, the general agent, would perform the duties of husbanding the *Eks* in the United Kingdom.

The powers of general agents and berth agents were alike restricted when vessels entered the immediate war zone areas. In those cases the Government performed all such services either by the military authorities or by the War Shipping Administration's own foreign service representatives. (Organized under War Shipping Administration Administrative Order 2, Supplement 4, September 26, 1942, and 4A (Revised), see also Administrative Order 52, December 3, 1943.) At the height of operations, War Shipping Administration maintained a staff of 675 employees located in almost every foreign port in the world in which its vessels were operating. Operating regions, headed by a Regional Director reporting directly to the War Shipping Administrator, were set up to cover all foreign areas. Port representatives, port engineers, and, in some cases, supplemental administrative and legal personnel were assigned at important ports in such areas to carry out the functions of the War Shipping Administration. Foreign service personnel was transferred from port to port as the war theatres changed and new fronts became active. Even at present, in Japan and Korea, no American steamship companies have been permitted to operate. The business of government merchant vessels operating in those areas is still handled exclusively by the foreign service representatives of the Maritime Commission as successor to the War Shipping Administration, operating through the military authorities.

General agents were further restricted in the extent of their authority by the action of the Government in entering into master contracts for the procurement of various ser-

vices and supplies required by general agents and berth agents for husbanding the vessels and affording them port services. Thus master contracts for repairing, terminal operation, stevedoring, bunkering, and food stockpiling were entered into by the Government. (See pp. 408-583 of Document 4, Plaintiff's Exhibit 7.) All repairs to vessels under general agency agreements were performed under one of several types of repair contracts (pp. 408-496), which included both master contracts for principal repairs and special contract forms to be used by agents in contracting in the name of the United States for isolated repairs when repair contractors under master contracts were not available. Eventually, all oil bunkers and diesel fuels supplied were delivered to the master of the vessel pursuant to orders placed by the general agent on his requisition under contracts designated Warshipfuel and Warshipdiesel (pp. 550-554). A contract designated Warshipfood (pp. 556-564) was also prepared and executed in various ports to assure adequate supplies of scarce foods for vessels. Similar arrangements were made in respect of towage services in various ports (Operations Regulation 27 and supplements).

Even in the absence of master contracts, the War Shipping Administration instructed agents in many respects as to the terms of the contracts they were authorized to make. In accordance with the agency agreements, the provisions of Legal Bulletin No. 1 (September 22, 1942) and General Order No. 42 (9 Fed. Reg. 4110), such contracts for vessel supplies and services were required to be executed in the name of the United States and agents were referred to in that capacity only. It is believed attention should be drawn to the provisions of certain Operations Regulation and their supplements, particularly Nos. 27 (Towage Contracts), 84 (Duties of Berth Agents, General Agents and Agents), 97 (Bunker Oil Contracts), 99, Supplements 1 and 2 (Pilferage). While some of these regulations were issued subsequent to the date of Caldarola's injury, the procedures codified therein had been established at an earlier date. The close character of the control exercised over general agents and berth agents is further indicated by the duties assigned

to the various units of the War Shipping Administration Division of Operations as indicated in Administrative Order No. 50 together with Supplements 1, 8, 13 and 17 thereto.

The most significant restriction on general agents is the lack of control over the masters and crews serving on vessels assigned to them which results from the requirement of Article 3A(d) that the master shall be the agent of the United States, not of the general agent, and in the exercise of his duties in the navigation and management, has exclusive control over the vessel and its crew. General agents are thus confined to procuring the crews and serving as the channel of command between the War Shipping Administration and the master. In 1942, at the commencement of War Shipping Administration operations, collective bargaining agreements between the maritime unions and the steamship companies were continued in force in accordance with the so-called Statements of Policy of May 4 and May 12, 1942, signed jointly by representatives of the Administration and the unions (see War Shipping Administration Operations Regulation No. 1). Subsequent changes in wages and working conditions were approved by the War Shipping Administration, and where required, by the War Labor Board, before being placed in effect by the Administration. Moreover, a Division of Maritime Labor Relations was created by Administrative Order 20 of June 10, 1942, for the purpose of handling labor relation problems arising in the course of operations and insuring the continuance of proper labor relations.

The relationship between the seamen and the vessel is brought home to them in such a way that they can never have any reasonable doubt that they were serving on United States-owned and operated vessels. The articles of employment signed by the seaman designate the United States as the owner of the vessel and the general agent as its agent. Thereafter he is directly supervised and controlled by the master throughout the entire course of the voyage. A certificate of ownership as well as a copy of the articles is conspicuously posted on board and seamen are thus constantly aware that they are serving on a vessel owned and operated

by the United States. Upon termination of the voyage wages are paid to members of the crew by the master in the presence of a Shipping Commissioner. Funds for the purpose are made available to the general agent by the Administration through deposit in the special joint bank accounts set up in the name of the agent "as general agent for the War Shipping Administration." These procedures inevitably brought home to the seaman his status was that of an employee of the United States.

It is believed that the above explanation of the roles of berth agents and master contracts and the status of masters and crews as employees of the United States shows that in their operations general agents clearly were not authorized to exercise the rights of an owner *pro hac vice* in manning, navigating and managing the vessels assigned to them. For your further assistance there is submitted with this letter a collection of official documents referred to herein so far as they are not included in Document 4 (Plaintiff's Exhibit 7).

Conclusion.

It is believed that the foregoing explanation conclusively establishes the purpose of the War Shipping Administration in undertaking direct operaton of its vessels by masters and crews subject exclusively to its control. The purpose appears to have been three-fold: First, to retain for government shipping the right to invoke sovereign immunity from foreign and local inspection, regulation and taxation; Second, to obtain for government shipping the freedom from strikes or labor stoppages which results from preserving the status of all seamen on War Shipping Administration vessels as government employees; Third, to insure the preservation of indispensable wartime secrecy by confining all litigation which might in any way involve the navigation and physical management of government vessels to the admiralty courts where necessary security measures could be applied. It is believed that the explanation further shows beyond the possibility of doubt that operation under the

general agency and berth agency agreements, as carried out by the regulations and master contracts of the War Shipping Administration, was direct government operation, differing in every essential respect from the peacetime contract operations involved in cases such as *Quinn* v. *Southgate-Nelson Co.* and *Brady* v. *Roosevelt S. S. Co.*

Respectfully,

WADE H. SKINNER,
General Counsel.

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Supreme Court of the United States

OCTOBER TERM—1946

No. 625.

PETER CALDAROLA (Plaintiff-Appellant in the Court below),

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Defendant,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & CO. (Defendants-Respondents in the Court below),

Respondents.

BRIEF FOR RESPONDENTS.

CLETUS KEATING,
VERNON SIMS JONES,
RAYMOND PARMER,
Attorneys for Respondents.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
Statement	1
Summary of Argument	7
Argument	8
This Case Depends on Control—*i.e.*, Physical Possession of the Vessel	8
Control as Indicated by the General Agency Contract	10
Control as Indicated by the Practices of the Parties to the Contract	12
The Actual Decision in the *Hust* Case	21
The Opinion of a Minority of Justices in the *Hust* Case	23
The General Agency Contract and Mr. Justice Douglas' Erroneous Construction of Its Provisions	24
The Case of *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, and Mr. Justice Douglas' Erroneous Application of It	35
Certain Collateral Matters Referred to by Mr. Justice Douglas in His Opinion in the *Hust* Case	42
Petitioner's Brief	46
Conclusion	51

TABLE OF CASES CITED.

	PAGE
Brady v. *Roosevelt S.S. Co.*, 317 U. S. 575	7, 24, 35
Caldarola v. *Thor Eckert & Co.*, 270 A. D. 563	6, 9
Caldarola v. *Thor Eckert & Co.*, 295 N. Y. 463	6
City of Los Angeles v. *Los Angeles Pacific Navigation Co., et al.*, 84 Cal. App. 413 (1927)	39
Cox v. *Lykes Bros. & U. S. Shipping Board Emergency Fleet Corp.*, 237 N. Y. 376	41
Cullings v. *Goetz*, 256 N. Y. 287	8
Florida, etc. Co. v. *U. S. Shipping Board Emergency Fleet Corp.*, 300 F. 169	41
Greco v. *Levy*, 257 A. D. 207	9
Hills v. *Leeds*, 149 F. 878	28
Hudson, The, 1925 A. M. C. 106 N. Y. Supreme Ct., Aff'd without opinion, 214 App. Div. 717	41
Hust v. *Moore-McCormack*, 328 U. S. 707	2, 7, 21
Mallory S.S. Co. v. *Garfield*, 10 Fed. (2) 664	41
Middleton v. *Whitridge* (1915), 213 N. Y. 499	5
Miller v. *Brooklyn Heights R.R. Co.*, 173 A. D. 910	5
Moch v. *Rensselaer Water Co.*, 247 N. Y. 160	9
Murray v. *Usher*, 117 N. Y. 542	9
New York & Cuba Mail Steamship Co. v. *United States*, 12 F. (2) 348 (1926)	39
Pacific Improvement Co. v. *Schubach-Hamilton S.S. Co.*, 214 F. 854	29
Panola, The, 1925 A. M. C. 1173 (C. C. A. 2nd Cir.)	41
Quinn v. *Southgate Nelson Corp.*, 121 F. (2) 190	37, 39
Reed v. *U. S.*, 11 Wall. 591, 600-601	28
Roberts v. *U. S. S. B. Emergency Fleet Corp.*, 240 N. Y. 474	34, 39

PAGE

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85 8

United States v. *Shea*, 152 U. S. 178 28

U. S. Shipping Board Emergency Fleet Corp. v. *O'Shea*, 5 F. (2) 123 41

STATUTES.

Internal Revenue Code, Tit. 26, §1426 (i) 44

New York Civil Practice Act, §608 5

New York Constitution, Arts. 6 & 7 6

Suits in Admiralty Act, 46 U. S. C. 741 41

OTHER AUTHORITIES.

Restatement of Law of Agency, §220, Comment on Sub-section 1-A; §358, Comment on Sub-section (1) a 45

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BRIEF FOR RESPONDENTS.

STATEMENT.

This case involves a question of importance to maritime interests in general. Although the particular case concerns a longshoreman who suffered personal injuries, the issue herein concerns equally the owners of damaged cargo, the owners of vessels, bridges, and piers damaged by collision, and the owners of shore property and persons on shore damaged by explosion, etc. The United States is also concerned, inasmuch as it is presently maintaining at least one

proceeding for limitation of its liability in which it alleges that the United States was the owner and operator of the offending vessel, and that its agent had no interest at all in the vessel or her pending freight. See "In the Matter of the Petition of the United States of America as owner of the Steam Tanker *Spring Hill*, etc.," U. S. District Court, Southern District of New York, Docket No. A 137-345.

The petitioner was a longshoreman, who was injured on January 27, 1944, while working on the *S. S. Everagra*, a vessel owned by the United States. R. 47, 22, 309, 337, 355. The respondents are partners doing business under the style, Thor Eckert & Company, R. 354. They were agents of the United States in respect of the *S. S. Everagra*. R. 337. They were appointed such agents by a General Agency Contract, which referred to them as General Agents. R. 337. This contract was the same as the contract involved in the recent case of *Hust* v. *Moore McCormack*, 328 U. S. 707.

Petitioner was employed by Jarka Corporation, stevedores. R. 20. While he was working at a winch at No. 3 hatch, a boom broke and fell. R. 23. Petitioner was struck and injured either by the boom or by the tackle attached to it.

The United States had contracted directly with Jarka Corporation, petitioner's employer, for unloading the vessel. R. 234, Defendant's Exhibit T. This contract contained a provision which read as follows:

> "4. The Administrator shall furnish and maintain in good working order all necessary masts, booms and winches and the necessary steam or power therefor: blocks, ropes for falls, dunnage, and necessary lights on wharves, piers and vessels when lights are required due to darkness; derricks or cranes when required to handle lifts in excess of the vessel's lifting capacity when, in the opinion of the Administrator, heavy lifts cannot satisfactorily be

handled by rigging the vessel therefor." (Defendant's Exhibit T, Part II, Section 4.)

The "Administrator" referred to above was the administrator of the War Shipping Administration.

Furthermore, the United States had also appointed Moore-McCormack Lines as an agent of the United States in respect of the *Everagra*. R. 236. Moore-McCormack Lines was known as a berth agent. R. 236. Pursuant to that agency, Moore-McCormack Lines had arranged with Agwilines to berth the vessel at Agwilines' Pier 34 for the purpose of discharging its cargo. R. 236, 237. Also, pursuant to that agency, Agwilines was instructed to arrange for the stevedoring, and it was by reason of this that Jarka Corporation, already under contract to the United States, was appointed as stevedore to discharge the vessel. R. 237.

The respondents herein, the General Agent, had nothing to do with any of these arrangements.

Petitioner claimed that the boom fell by reason of the negligence of the respondents in failing to perform a duty to him to exercise reasonable care to have the boom in sound condition. Respondents contended that, assuming that petitioner's injuries were caused by the negligence of someone, there was no negligence on the part of the respondents. R. 93, 296, 330. This was by reason of the fact that respondents were not operators of and in control of the vessel. Viewed otherwise, respondents contended that, if petitioner's injuries were caused by the negligence of anyone, they were caused by the negligence of the United States because the United States was the occupier of the premises, and, thus, had the duties which arose from that status.

The trial court charged the jury, as a matter of law, that respondents neither owned, possessed, nor controlled the vessel; had not supplied the boom to the longshoremen for

their use; that the longshoremen, including the petitioner, were not business invitees of respondents, and that respondents did not owe petitioner any duty arising out of such relationship. R. 307, 309, 310.

Petitioner's (plaintiff's) counsel expressly informed the trial court that petitioner's claim "was not based at all upon the *operation* of the vessel. It is based *only* on the duty *that the agent has under the contract* to make, to arrange for repairs, to make inspections and replacements." (Emphasis ours) R. 320. Accordingly, the court charged the jury that "in view of the limited control, as evidenced by the General Agency Agreement", respondents had a duty to the plaintiff "to use reasonable care in inspecting, repairing and replacing, when necessary, the ship's boom so that it would be reasonably fit and safe for the work for which it was intended." R. 307, 312. Respondents excepted to this, and also to the court's refusal to charge that the duties mentioned in the contract were owed only to the United States. R. 326, 332. There was a verdict for the petitioner, from which the respondents appealed to the Appellate Division.

In the Appellate Division petitioner changed his position. He conceded that his proof of respondents' contractual obligation to the United States was not the equivalent of proving a duty of respondents to the petitioner. *Additional papers to the Court of Appeals, p. 10.* He thus recognized that it had been incumbent on him to show that respondents were in control of the boom at the time of the accident. He was thus faced with an inevitable reversal of the judgment.

The reason for this was that the jury's verdict was not based on a finding of control. The jury had been peremptorily instructed that the respondents were not in control. R. 307, 309, 310. Furthermore, if there was no evidence to support a conclusion that respondents controlled the boom,

petitioner was faced with a dismissal of his complaint. And, so, petitioner undertook on appeal to show for the first time that there was evidence in the record which would support such a conclusion of control.

By so doing, the most that he could hope for was to save himself from a dismissal and obtain an opportunity on a new trial to convince a new jury that respondents were in control.

The Appellate Division rejected the trial court's thesis that respondents' access to the vessel for the purpose of inspection and repairs amounted to "control". According to the Appellate Division, it did not amount to control even in a limited sense. It said that the "opportunity and duty" which the respondents "had to order repairs" was "not the equivalent of control or a substitute for control in relation to the public". Respondents merely had "access to the ship and had a contractual duty to the United States * * *". This was not the equivalent of control. 270 A. D. 563.

Accordingly, in the absence of control, the Appellate Division held that there was no duty owing to the petitioner by the respondents to exercise reasonable care. The Appellate Division, therefore, reversed the judgment, both on questions of fact and of law, and dismissed the complaint. *Supplemental additional papers to the Court of Appeals, p. 6.*

The Appellate Division had power to find facts—i.e., to weigh the evidence and to make findings based on its conclusions.

New York Civil Practice Act §608;
Middleton v. *Whitridge,* (1915) 213 N. Y. 499;
Miller v. *Brooklyn Heights R.R. Co.,* 173 A. D. 910.

The only factual issue submitted to the Appellate Division was that of control of the vessel. This issue was raised by respondents' contention that there was no evidence to show that respondents controlled the vessel and petitioner's contention that there was some evidence which showed such control. In so contending, petitioner submitted the evidence on which he relied to such appraisal as the Appellate Division should choose to give it. Accordingly, the Appellate Division's reversal on questions of fact shows that it chose to weigh the evidence and, as a result, found that the respondents were not in control. Furthermore, the Appellate Division's reversal on questions of law shows that it found that there was no evidence to support a different conclusion.

Petitioner thereupon appealed to the Court of Appeals. This appeal was only from the Appellate Division's reversal on questions of law. The Court of Appeals has no power to hear an appeal from a reversal on questions of fact.

New York Constitution, Article 6, §7.

The Court of Appeals affirmed the Appellate Division's reversal on the law, saying: "We are in full agreement with the Appellate Division's conclusions and the reasons therefor, as stated in its opinion." 293 N. Y. 463, at 466.

Therefore, as the case comes to this court, the precise legal question involved is whether the Court of Appeals was correct in affirming the Appellate Division's reversal on questions of law. Since certiorari was granted in this court in respect of the order of the Court of Appeals only, the Appellate Division's reversal on questions of fact is not before this court.

Summary of Argument.

The only possible liability of the respondents for negligence depends on control of the vessel and its appliances at the time of the accident. The control referred to is actual physical possession. Respondent did not have such control. It had only a right of access to the vessel for the purpose of performing the limited services required of it. Pages 8-10. The General Agency Contract stated explicitly that it was the intention of the parties that such control should be reserved to the United States. Pages 10-12. In actual practice, the United States reserved and exercised control. Pages 12-21. There is no evidence to the contrary. Pages 46-51. The prior decisions of this court—*i.e.*, *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 and *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707, do not hold to the contrary. Pages 24-35, 35-42. In the *Brady* case, which involved an entirely different contract, this court declined to decide whether the agent of the United States was in control or not. Pages 36-38. The *Hust* case involved only the right of a seaman to sue under a Federal statute, which is not applicable herein. Pages 21-23. Although it did not decide the question of control, the majority of the court said either that the General Agent was not in control or that the United States was the "technical" employer of the crew. Pages 21-23. This case is stronger than the *Hust* case in showing that the General Agent was not in control because of the evidence as to the actual practice of the United States and the General Agent, much of which was not present in the *Hust* case. Pages 12-21.

Argument.

THIS CASE DEPENDS ON CONTROL, *i. e.*, PHYSICAL POSSESSION OF THE VESSEL.

The petitioner was not employed by the respondents. Therefore, respondents did not owe him any duty to exercise care with respect to the vessel and its appliances, unless the vessel and its appliances were in respondent's control.

Even the liability for unseaworthiness, as announced in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, depends on control. Primarily, it is a liability of the owner of a vessel. By extension it may apply in the case of a non-owner—*i.e.*, one to whom the owner has given control by reason of a demise.

The control referred to herein is actual, physical control. As Judge Cardozo said in *Cullings* v. *Goetz*, 256 N. Y. 287, at p. 290:

> "The power of control * * * implies the power and right to admit people to the premises and to exclude people from them".

In a given case either there is such control, or there is not. There is no middle ground.

The right to go on a vessel for one purpose or another may be thought of, figuratively, as involving a "measure of control". But that is not the kind of control that gives rise to the legal duties with which we are concerned herein. Such "measure of control" is no more than access to the vessel, and should be referred to as such. It does not embrace the right to exclude or admit others from or to the vessel.

Thus, the General Agent in the present case had a duty to make inspections of the vessel and to report to the United

States from time to time so that the "United States may satisfy itself that the vessels are being properly maintained." R. 349. Anyone having a duty to inspect and report has an implied right of access to the object which must be inspected. But no right is implied to give or deny access to others. So, in the case of the General Agent.

Moreover, even if the General Agent had failed to perform his duty of making such inspections and reports as the contract required him to make, and there is no proof of this in the present record, the General Agent would not be liable to the petitioner in the absence of proof that the General Agent was in control. From time immemorial it has been held that an agent is not liable to a third person for an omission or neglect of duty in the matter of his agency.

Murray v. *Usher*, 117 N. Y. 542;
Greco v. *Levy*, 257 A. D. 207.

To sustain an action in tort there must be "a duty of care, irrespective of contract".

Moch v. *Rensselaer Water Co.*, 247 N. Y. 160 at 167.

There is a distinction between "launching an instrument for harm and failing to become an instrument of good".

Caldarola v. *Thor Eckert & Co.*, 270 A.D. 563 at 567.

The latter is not actionable unless one has "incurred an obligation of action".

Caldarola v. *Thor Eckert & Co.*, 270 A.D. 563 at 567.

The obligations of the General Agency contract were obligations solely to the United States. If there was any

obligation to the petitioner, it must be found elsewhere. The only source suggested by petitioner is that the General Agent controlled the vessel.

CONTROL AS INDICATED BY THE GENERAL AGENCY CONTRACT.

The General Agency Contract shows clearly that it was the intention of the parties that physical control of the vessel should be reserved to the United States. Likewise, it was their intention that only the business of the vessel should be entrusted to the General Agent.

Thus, on the one hand, the contract provided that the General Agent was appointed as an "agent, and not as an independent contractor, to manage and conduct the business of the vessels assigned to it by the United States from time to time". R. 337. On the other hand, with respect to the vessels themselves, the contract provided:

> "The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel". R. 338.

The master of a vessel has physical control of a vessel by law and independently of any contract. Therefore, the only purpose of this provision was to deny to the General Agent any power to control the master, and, through such control, any power to control the vessel itself.

The agreement of the General Agent that the master should "have and exercise full control" was an agreement that the General Agent should not have any control at all. That is what "full control" necessarily means in an agreement such as this. The United States thus deliberately excluded the General Agent from control of the vessel.

The demarcation between management of a vessel and management of a vessel's business is one of the facts of

the shipping business. Those who had part in making the General Agency Contract were familiar with this fact. The contract which they made reflected this familiarity.

Even to persons not so familiar with the shipping business, it should be obvious that this demarcation exists. A vessel's business includes such activities as the solicitation and the booking of passengers and cargo; the purchase of food, victuals and supplies; the keeping of records; the collection and disbursement of money; making contracts with shore contractors for repairs and maintenance and for the loading and stowage of cargo; making arrangements for the berthing of vessels; management of a pier; and arranging with maritime unions for supplying personnel. These are activities which have no relevance to the actual physical operation of, or dominion over, a vessel. They are all capable of performance, generally on shore, without infringing in the slightest on the actual physical control of the vessel by its master. In normal private operation, many of them are performed by shore personnel, who never see the ship.

On the other hand, the management of a vessel, including its navigation, both in port and at sea, takes place on the vessel itself. It is primarily, and by law, in the hands of the master.

The General Agency Contract reflected this demarcation. Referring to one field of activity as the "business" of the vessel, it entrusted the management of this part of the operation to the General Agent, while, on the other hand, it expressly denied to the General Agent any control over the master, by reserving to him, as an employee of the United States, "full control, responsibility and authority with respect to the navigation and management of the vessel".

There was more to this than the mere labelling of the master as "an employee of the United States". There was an allocation of power as between the United States and the General Agent and a manifestation of intent on both sides that the General Agent should not have power over the master.

Even as respects the performance of the limited services required of him, the General Agent was permitted to act only as an agent, and "not as an independent contractor" R. 337, Art. 1. Furthermore, he was permitted to act only "in accordance with such directions, orders, or regulations as the latter (United States) has prescribed, or from time to time may prescribe" (R. 337, Art. 2). Thus, both in the language of lawyers and in the language of businessmen it was made clear that the agent was not acting "on his own", but solely for the United States.

The demarcation of function as between the United States and the General Agent was further emphasized by the contractual provision that the General Agent should "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel" R. 39, Art. 3A(d). In view of this, there can be no doubt that the parties to the contract contemplated the establishment of the master and servant relationship between the United States and the crew, but not between the General Agent and the crew.

CONTROL AS INDICATED BY THE PRACTICES OF THE PARTIES TO THE CONTRACT.

In the case at bar, the evidence that the United States controlled the vessel did not consist merely of the foregoing statements of intention as to the allocation of power, and as to the relationship resulting therefrom. In addition thereto, there was evidence that, in actual practice, the

United States had and exercised physical control of its vessel to the exclusion of the General Agent. Therefore, in this case it may not be assumed, as some have said, that the parties said one thing in the General Agency Contract, and actually did another. The evidence of what the parties actually did consists, in part, of the orders and regulations issued by the United States in the course of the wartime operation of its vessels, including the *SS. Everagra* involved in this case. Some of the more important of these regulations have been bound together in a booklet which will be furnished to the court.

These orders and regulations were put in evidence by the petitioner at the insistence of the respondents. R. 93, 97, 108. There was a stipulation that all such orders and regulations should be considered as in evidence even though not read to the jury. R. 298. Actually, many of the more significant orders and regulations were read to the jury. R. 206 to R. 225.

These orders and regulations were issued pursuant to Article 2 of the General Agency Contract, wherein it was provided that the General Agent should act in "accordance with such directions, orders, or regulations as the latter (United States) has prescribed, or from time to time, may prescribe * * *." R. 337. They show not only by their content, but by their multiplicity, that the United States of America reserved to itself the actual physical operation of its vessels, and confined the General Agent to a relatively limited field of activity, described as the business of the vessel. Within that limited field the General Agent was subject to the direction of the United States with respect to the smallest details. The regulations show this conclusively. Furthermore, other evidence shows that not all of the vessel's business was entrusted to the General Agent. Some items of business were reserved to the United States.

Other items were allocated to other agents of the United States known as berth agents, over whom the General Agent had no control.

Thus, Administrative Order No. 50 provided, among other things, that the United States of America should have a Division of Operations. Administrative Order No. 50, Supplement 1, provided that in the Division of Operations there should be a Marine Operations Section which should be "responsible for manning, crewing, and stowing of vessels; for handling matters relating to personnel aboard ship, and for other activities in connection with the physical operations of vessels, with the exception of repair; for the maintenance of records and handling from an operating point of view of all casualties due to war risks and arranging for repatriation of seamen; * * *".

This was no mere provision for the supervision of vicarious operation. It fixed responsibility for "*physical operation*" of United States owned vessels directly on a section of the War Shipping Administration.

In line with the foregoing administrative provision, the War Shipping Administration discharged this responsibility.

Thus, in Operations Regulation No. 1 it defined the policy to be followed in connection with the employment of crews. This policy related to wages and working conditions and discipline, and was based upon agreements made directly between the War Shipping Administration and the unions. General Agents had no part in the making of these agreements.

If a General Agent were actually in control of the vessel and were the employer of the crew, would he not have had something to say about wages and working conditions? That is one of the prerogatives of an employer which the United States reserved to itself in actual practice.

The War Shipping Administration regulated discipline on board its ships. Thus, in Operations Regulation No. 16, it directed that when vessels were not in war theatres "the control and authority over the vessel rests solely with the master, subject to the directions of the War Shipping Administration".

The regulation and enforcement of discipline is both the prerogative and the responsibility of an employer. Here, the United States reserved this important function to itself in actual practice. But, more important to this case is the fact that the War Shipping Administration said, in effect, that the General Agent was to keep his hands off this matter because the master was subject to the directions of the War Shipping Administration, and not subject to the directions of the General Agent. Since the master, who controlled the vessel, was not subject to control by the General Agent, it follows that the General Agent did not control the vessel.

Thus was effectuated in actual practice the allocation of power referred to in the General Agency Contract when it was provided that: "The Master should be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel". R. 338, 339, Art. 3A (d).

The War Shipping Administration made provision for the prevention of accidents on board its vessels. Thus, in Operations Regulation No. 42, it directed that the master and chief officer of its vessels should see that floor plates were firmly bolted down in order to prevent injuries to members of the crew.

Again, in actual practice, the War Shipping Administration reserved to itself the performance of one of the

important functions of an employer. Moreover, its action was not mere supervision. It was actual direction.

The War Shipping Administration exercised control over the stowage of cargo. Thus, in Operations Regulation No. 46 it directed that, insofar as stowage was concerned, "* * * General Agents should go no further than to make suggestions, subject always to the master's approval or disapproval, and should be careful to avoid the direction or supervision of the stowage of cargo".

In normal private operation a shipowner is responsible for bad stowage. His responsibility arises from the fact that the master is his employee, and subject to his control. However, in Government operation, as the foregoing demonstrates, the General Agent was subordinated to the master, and explicitly barred from controlling the stowage. There could not be a clearer demonstration of the fact that in actual practice the United States physically controlled its own vessels, through control of the master, and that its General Agents did not.

It was the United States, and not the General Agent, which gave orders to the master. In this connection the General Agent acted merely as the messenger for transmitting the orders of the War Shipping Administration to the master.

Thus, in Operations Regulation No. 30, General Agents were instructed to notify masters of vessels to keep deep tank covers bolted down securely. In Operations Regulation No. 43, General Agents were directed to instruct masters of vessels to use water instead of fuel oil for ballast purposes. In Operations Regulation No. 46 General Agents were instructed to post notices on bulletin boards as to how crews should act in case they were taken prisoners of war.

One of the most important indicia of control is the giving of orders. Herein, in actual practice, the United States

gave the orders to the masters of its vessels. On the other hand, the General Agent gave no orders at all, but merely acted as a conduit for the orders of the United States, which thereby exercised full and complete control of its own vessels.

If the General Agent had been in control, the War Shipping Administration would have ordered the General Agent to bolt down covers, to use water instead of fuel oil, etc., etc. There would be no point in directing the General Agent to direct the General Agent's employees, and it would have been unnatural to couch the orders in such terms.

The United States, in actual practice, managed that part of the undertaking having to do with ship repairs and maintenance. Thus, Administrative Order No. 50 provided that there should be a Division of Maintenance and Repair which "exercises full authority and supervision over all repairs and the maintenance of vessels under the control of the War Shipping Administration in all ports in the Continental United States, Canada, and Trinidad, and discharges fully all of the functions and responsibilities of a maintenance and repair nature arising under the master repair contract * * *. In the field, the activities of this Division are directed by district managers * * * who exercise control over all ship repairs and maintenance in their respective districts, reporting directly to the Director of Maintenance and Repair Division in New York."

Furthermore, the War Shipping Administration issued regulations on this subject. Among these was Maintenance and Repair Regulation No. 1, Revised, which is printed in full at R. 359-363. This regulation provided, among other things, as follows:

> (1) that the "maintenance and repair of all vessels owned by * * * and operated for account of the

United States, represented by the War Shipping Administration, are under the direction of the Executive Manager, Maintenance & Repair Division, (an employee of the United States) who will exercise full authority and control over all ship repairs and maintenance in which the War Shipping Administration may be concerned * * *" R. 359.

(2) that, in cases where vessels "require repairs * * * involving the expenditure of not more than $10,000 in respect to any one voyage, the General Agents shall arrange for and order the performance of such repairs without prior written approval of the Local Manager, Maintenance and Repair Division". R. 360. The repairs referred to were those requested by the crew in their requisitions, which were prepared by the crew at the end of each voyage. R. 147, 156, 157.

(3) Within the limited field in which General Agents were thus authorized to act, the regulation provided further that General Agents should, among other things,

"a. Determine the repairs necessary," *i.e.*, which of the repairs requested by the crew were necessary. R. 361.

"c. Arrange with the Local Manager for drydocking and other surveys, and for inspectors to view the work when the cost of repair may exceed the prescribed limit." R. 361.

"e. Place in hand and award contracts for repairs." R. 361.

"g. Obtain completion certificates, signed by a representative of the General Agent, the Master or Chief Officer, and Chief Engineer, showing that the repairs have been completed." R. 361.

(4) In case the repairs involved "the expenditure of more than $10,000 in respect to any one

voyage,'' the Maintenance and Repair Division of the War Shipping Administration was authorized to arrange for the repairs, to the exclusion of the General Agents. R. 362, 363.

Here, in actual practice, the United States reserved to itself the control of an important aspect of the business of its vessels. On the other hand, General Agents were restricted to a limited field of service in connection therewith. Moreover, this shows what the parties really meant when they provided in the General Agency Contract that the General Agent should, subject to instructions of the United States, "arrange for the repair of the vessels". R. 349, Art. 14. This was no general undertaking on the part of General Agents to repair vessels or to keep them in repair. It was an undertaking to attend to the business arrangements respecting repairs when *requested* to do so. In actual practice, as the Maintenance and Repair Regulations show, the only repairs which the General Agent was required or permitted to arrange for were those involving an expenditure of not over $10,000. Even as to such repairs, the General Agent had a duty to "order" repairs only when a vessel should *require—i.e., request*—repairs. This was shown not only by the foregoing regulations, but by the testimony of the assistant local manager of the Maintenance and Repair Division. R. 147, 156, 157. There is no testimony which even suggests a greater duty.

Actually, the repairs which were requested by the crew at the end of the voyage which preceded the accident amounted to over $29,000. R. 146. Thus, the matter of arranging for repairs to the *Everagra*, so far as they were needed immediately before the accident, was not respondent's concern. It was the concern solely of the War Shipping Administration.

Neither in the contract nor in the regulations was there any requirement that the General Agent should inspect vessels so that it could decide on the necessity for repairs. The General Agency Contract specifically provided that the purpose of the inspection which the General Agent should make was to inform the United States so that "the United States may satisfy itself that the vessels are being properly maintained". R. 349; Art. 14. Here, again, it was the United States which was in control. It was the United States, and not the General Agent, which decided what was proper in the way of maintenance.

It was the United States, and not the respondents, which contracted with petitioner's employer for the unloading of the *SS. Everagra*. It was the United States, and not the General Agent, which undertook by written contract to provide the petitioner and all the other stevedores with a safe boom. Defendant's Exhibit T, Part II, Section 4.

Normally, the making of contracts with stevedores is one of the most important aspects of a ship's business. But, under the General Agency Contract, the United States had the right to assign to General Agents as much or as little of the ship's business as suited the United States. R. 337. In actual practice, therefore, the United States chose not to assign to General Agents two most important items—*i.e.*, the loading and unloading and the maintenance and repair of vessels.

Nothing could show more clearly the restricted field of operations of General Agents. To say that a General Agent controlled the vessel, when he was not even permitted to sign a contract with stevedores for its unloading, or with a repair yard for repairs costing more than $10,000, borders on the absurd.

The respondent herein had nothing to do with berthing the vessel at Agwilines Pier 34, where she was at the time

of the accident. Arrangements for this were made by Moore-McCormack Lines, acting as berth agent for the United States. R. 236. Jarka Corporation, the stevedores, were appointed to do the stevedoring, not because of any relationship they bore to the petitioner herein, but by reason of arrangements for which Moore-McCormack Lines, the berth agent, was responsible. R. 237. As already indicated, there was a standing contract between the United States and Jarka Corporation. Defendant's Exhibit T.

Here, again, we have an instance where, in actual practice, the General Agent's activity was restricted even as respects the management of the business of the vessel.

It should be noted that Moore-McCormack Lines, Inc., the berth agent, was originally named as a defendant in this proceeding. The complaint alleged that Moore-McCormack Lines operated and controlled the vessel. R. 6. Petitioner did not proceed with the case against the berth agent. However, one may well ask why. The General Agent and the berth agent each managed a limited portion of ship's business. Neither managed the vessel itself. If there was no case against the berth agent worth prosecuting, neither was there one against the General Agent.

Moreover, if it should be assumed that there was a case against one, there was just as good a case against the other. Indeed, if there is any ground for distinction between them, the case against the berth agent appears to be the better, for it, and not the respondents, made the arrangements which resulted in the doing of the work which caused petitioner's injury. R. 237, 238.

The actual decision in the *Hust* case.

Petitioner relies principally on a recent decision of this court, which, actually, is not in point. This decision is *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707.

The decision in the *Hust* case was by a divided court consisting of only seven justices. It involved the rights of a seaman to recover damages under a Federal statute—the Jones Act. Mr. Justice Rutledge, who wrote the opinion, seemed to accept the conclusion of the court below that the seaman was "technically" an employee of the United States, and, therefore, not an employee of the General Agent in the traditional common law sense. On the other hand, Mr. Justice Rutledge held that, for the purpose of permitting a seaman to sue the General Agent under the Jones Act, he need not be his employee in the traditional common law sense. It was sufficient for that purpose if he were an employee of the General Agent in the special sense indicated by Congress in passing the War Shipping Administration Clarification Act. In the opinion of the court, the seaman was an employee of the General Agent in this special sense.

Neither the Jones Act nor the War Shipping Administration Clarification Act have anything to do with the case at bar. The question here is who controlled the vessel. The employment of the crew, apart from the master, is merely one of the circumstances from which an inference of control may be drawn. Moreover, the control in question is physical control in the common law sense.

The question of control was not decided in the *Hust* case. It was merely discussed. Three of the Justices, Messrs. Reed, Frankfurter and Burton, said that the General Agent was not in control, and that he was not the employer of the crew in the traditional common law sense. Two of the Justices, Messrs. Douglas and Black, came to the contrary conclusion. Mr. Justice Rutledge and Mr. Justice Murphy did not state their position in this respect, beyond indicating an acceptance of the finding of the court below that the seamen were "technically" employees of

the United States. They did not define what was meant by a "technical" employee—*i.e.*, whether he was an employee in a narrow, unreal sense or an employee who was fully embraced in the technical definition of the master-servant relationship.

THE OPINION OF A MINORITY OF THE JUSTICES IN THE *Hust* CASE.

Petitioner's argument in this court consists of little more than quotations from the foregoing opinion of Mr. Justice Douglas, which is referred to as the opinion of the court. Petitioner's Brief, 9-12. As already pointed out, it was not the opinion of the court. On the other hand, it does contain about all that can be said on petitioner's behalf. That being the case, it is necessary to examine it carefully. Such an examination will indicate that its reasoning and conclusions, especially as applied to this case, are not supportable.

It may be that, if the record in the *Hust* case had contained the evidence contained in the present record with respect to the actual practice of the parties to the contract, Mr. Justice Douglas would have noted and placed in proper perspective those portions of the General Agency Contract which reserved control to the United States and denied it to the General Agent. At least, it would not have been appropriate to say, as he did therein (328 U. S. 707, 736):

> "I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business".

In the case at bar, the evidence shows that the United States managed part of the business itself, and assigned the management of other parts of the business to the General Agent, and to a berth agent as well, both of whom were subject at all times to the direction of the United

States as to details. Furthermore, both in the General Agency Contract and in practice, the United States sharply distinguished between the management of business and the management of the vessel as a physical entity. The latter it reserved to the United States and to the United States alone.

The evidence in this case shows this so strongly that the Appellate Division and the Court of Appeals of the State of New York held *as a matter of law*, that the United States was the manager of that part of the undertaking involving possession of the vessel, and that the General Agent was not.

THE GENERAL AGENCY CONTRACT AND MR. JUSTICE DOUGLAS' ERRONEOUS CONSTRUCTION OF ITS PROVISIONS.

In arguing that the General Agent had possession of the vessel, Mr. Justice Douglas, it seems, proceeded on two main grounds. The first involved an analysis of the provisions of the General Agency Contract. The second involved a comparison of the provisions of the General Agency contract with the provisions of the contract involved in the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575.

Insofar as his argument depended on an analysis of the General Agency Contract, Mr. Justice Douglas proceeded by way of five steps to his ultimate conclusion. These steps were as follows:

First. Some of the provisions of the General Agency Contract indicate that the parties intended that possession of vessels should pass to the General Agent (328 U. S. 707, 735).

Second. Other provisions of the contract indicate the contrary (328 U. S. 707, 735).

Third. The latter contractual provisions are not decisive because the law looks not to what parties say, but to what they do (328 U. S. 707, 736).

Fourth. Since what the parties say is not decisive, those portions of the contract which tend to show that they did not intend that possession should pass to the General Agent must be rejected (328 U. S. 707, 736).

Fifth. This leaves for consideration only those portions which tend to show that it was the intention that possession should pass to the General Agent (328 U. S. 707, 736).

Ergo. Possession did pass.

This argument is unsound in both the first and fourth steps.

In support of the first step of this argument, Mr. Justice Douglas relied, in part, on the following provision of the General Agency Contract.

> "Article 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States,* in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, *of such vessels as have been* or may be by the United States *assigned to and accepted by the General Agent* for that purpose."

The words emphasized in the above quotation are the words to which Mr. Justice Douglas referred particularly, as shown by the excerpts given in his opinion (328 U. S. 707, 735).

Mr. Justice Douglas, evidently, took the phrase "assigned to and accepted by the General Agent" as meaning "*delivered* to and accepted by the General Agent". (Emphasis ours.)

But, the parties to the contract did not use the word "delivered". If they had contemplated that physical control would pass to the General Agent, "deliver" would have been the natural word for them to use. Their use of the word "assigned" negatives the existence of an intent that physical possession of the vessels should be delivered.

Furthermore, the contract did not, as Mr. Justice Douglas indicated by his partial quotation from it, refer to vessels which had been "assigned to and accepted by the General Agent". The clause, as set forth in the contract, read: "assigned to and accepted by the General Agent *for that purpose*". (Emphasis ours.) As a full reading of the clause shows, the purpose referred to was that of conducting the vessel's business.

If the phrase "for that purpose" had been omitted entirely, it would have been assumed, without more, that the assignment and acceptance of vessels was for the purpose stated in the contract—*i.e.*, to conduct the vessel's business. Therefore, the only reason for adding the phrase "for that purpose" was to exclude the notion that the assignment could be for any other purpose. Thus, the meaning intended was that the assignment was *only* for the purpose of conducting the vessel's business.

Delivery of physical control of a vessel is not necessary for the purpose of conducting a vessel's business. Mr. Justice Douglas conceded in his opinion that there was an essential difference between the two, for he said (328 U. S. 707, 737):

> "The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control."

If, as the contract indicates, the vessels were to be assigned only for the purpose of conducting the vessel's

business, it follows that the parties did not contemplate physical delivery when they used the word "assigned". Delivery was not necessary to the accomplishment of the purpose which the parties had in mind. They could not, therefore, have intended delivery.

An assignment of a vessel, but only for the purpose of conducting a vessel's business, is no more a delivery of a vessel than an assignment of a judge for the conduct of judicial business is a delivery of the judge. The acceptance of a vessel so assigned is not the acceptance of the vessel itself. It is an acceptance of the assignment.

Evidently, it was partly by reason of failing to note the phrase "for that purpose" at the end of Article 2 of the contract that Mr. Justice Douglas was misled into concluding that this case was not one where the Agent was hired only for the purpose of attending to the vessel's business.

The mistake may have been caused also by misapprehension of the meaning of such terms as "pro hac vice" and "demise". For example, Mr. Justice Douglas at one portion of his opinion said (328 U. S. 707, 734):

> "A charterer who obtains exclusive possession and management of the vessel from the owner is owner pro hac vice, and subject to the responsibilities of ownership for the duration of the charter period. *Reed* v. *United States*, 11 Wall. 591, 600-601; *Leary* v. *United States*, 14 Wall. 607, 610; *United States* v. *Shea*, 152 U. S. 178."

At another portion of the opinion he said (328 U. S. 707, 737):

> "A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 F. 878."

At another portion of the opinion he said (328 U. S. 707, 738):

> "These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice.*"

But, the term "owner *pro hac vice*" is applicable *only* to one to whom a vessel has been demised. Demise means the transfer of possession.

Thus, in *United States* v. *Shea,* 152 U. S. 178, at 189, the court said:

> "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control."

In *Hills* v. *Leeds,* 149 F. 878, at 880, the court said:

> "This contract must be held to be a contract of lending and hiring, and not a mere contract of service. By it there was a demise of the vessel; her possession, command, and control passed from the owner to the hirer or charterer. The charterer became the *owner for the voyage.*" (Emphasis ours.)

Owner *pro hac vice* means owner for this occasion.

In *Reed* v. *United States,* 78 U. S. 591, at 601, the court said:

> "Unless the ship herself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command and navigation of the ship, is the agent of the general owner and the mariners are regarded as in his employment and he is responsible for their conduct." "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view

can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts."

In *Pacific Improvement Company* v. *Schubach-Hamilton S. S. Co.*, 214 F. 854, at 859, it was said:

> "The presumption is that the contract was one of affreightment merely, and the contrary must clearly be made to appear before it will be held to constitute a demise."

Thus, if Mr. Justice Douglas was correct in saying there was no demise, he was incorrect in concluding that the General Agent had been granted possession and control of the vessel. Furthermore, if he was correct in concluding that the General Agent was given possession and control of the vessel, he was incorrect in saying there was no demise. There is no middle ground, unless such terms as "owner pro hac vice" and "demise" are used to denote a novel relationship unheard of in any of the cases already decided.

Mr. Justice Douglas also relied on the following provisions of the contract:

> "Article 11. (a) The United States shall have the right to *terminate* this *Agreement* at any time as to any and all vessels assigned to the General Agent and *to assume control forthwith of* any and all said *vessels* upon fifteen (15) days' written or telegraphic notice."
>
> "Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, *all vessels and other*

property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall *be immediately turned over to the United States,* at times and places to be fixed by the United States, * * *"

The words italicized in the above quotation are the words to which Mr. Justice Douglas referred particularly, as shown by the excerpts given in his opinion. (328 U. S. 707, 734, 735).

The real meaning of Articles 11 and 12 was misunderstood by Mr. Justice Douglas. Anyone unfamiliar with the shipping business would be likely to make the same mistake.

In understanding these clauses it is necessary to have in mind that there are occasions when vessels do not have any masters at all. Indeed, there are times when they do not have crews. The latter occurs when they are in laid-up status. The General Agency contract, therefore, contemplated that, when this should occur, General Agents would have temporary custody of vessels. Accordingly, the contract provided that, if any vessels should be in the "custody" of the General Agent at the time of the termination of the contract, they should be turned over to the United States, which would then assume control. Such provisions, on their face, had no reference to a vessel which was commanded by a master who, as "an employee of the United States", had and exercised "full control, responsibility and authority with respect to the navigation and management of the vessel". As to such a vessel, there was no need for such provision because the vessel was already in the control of the United States.

In further support of the conclusion that possession passed to the General Agent, the opinion in question goes

on to say that "Management of the vessels also is granted to the General Agent". (328 U. S. 707, 735).

The only parts of the contract which the opinion cites in support of the conclusion that management of vessels was granted to the General Agent are those parts which define the various business services which the General Agent agreed to perform. As already explained, these do not involve control or management of vessels. They involve the making of contracts with shore contractors who agree to furnish the United States with equipment, food, and supplies, and agree to perform for the United States the functions of maintenance. The General Agent's usefulness lay in his knowledge of the shore market. Likewise, with respect to personnel, his usefulness lay in knowledge of the shore market. Therefore, he was hired to "procure" labor in the market place—i.e., the Union Hall. It was likewise with respect to the General Agent's undertaking to "arrange for the repairs of vessels". R. 349, Article 14. The very words import the making of contracts.

General Agents did not, as a rule, have storehouses filled with equipment, food, or supplies. Most of them did not employ men to do maintenance work, the nearest analogy to which, in terms familiar to landlubbers, is the periodical greasing and oiling of an automobile. They had no shipyards for repairing ships. Neither did they have a supply of seamen under contract to go on vessels wherever they were sent. But, they did know where to buy these things and to find the right persons to perform these services at fair prices. And that is exactly what they undertook to do. It was "business" of a vessel, but not management of a vessel.

Other articles of the contract, not referred to in Mr. Justice Douglas' opinion, show this conclusively. Thus, in Article 15 it was provided that the United States might

have the advantage of "any existing or future contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessel owned or operated by the General Agent."

It is to be noted, in passing, that the parties herein demonstrated that there was a distinction between vessels covered by the General Agency Contract, as to which the General Agent was not the physical operator, and vessels not covered by the General Agency Contract, as to which the General Agent might be either the owner or the physical operator.

In Article 16 (c) it was provided that "In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall * * *". R. 351.

In Article 16 (d) it was provided that "The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of * * *". R. 351.

Thus, by its context, the contract shows that all that the General Agent undertook to do was to perform certain services for the United States. Those services consisted mainly of making business arrangements between the United States and other persons and interests. Although the General Agent might, if he wished, load and unload and repair a ship, the General Agency Contract did not

require him to do so. If the agent did such work, it would be because of some other and entirely different contract.

Evidently, Clause 3 A. d, R. 338, referred to above, which specifically reserved the management of the vessel to the master, an employee of the United States, was overlooked. At least, it is not referred to at any place in the entire opinion. If the parties intended to grant management of vessels to the General Agent, this clause was a rather strange way of putting it.

In the light of the foregoing, the first step in Mr. Justice Douglas' argument is without support in the provisions of the General Agency Contract.

The fourth step in the argument is unsound because it involves a non-sequitur.

Undoubtedly, as Mr. Justice Douglas says, the declarations of parties as to the nature of the relationship they intend to create is not decisive of the actual relationship which results. But it does not follow that, because such declarations are not decisive, they are to be rejected. Mr. Justice Douglas' opinion rejects them. At the same time, other provisions of the contract are emphasized. However, if selected contractual provisions are to be rejected merely because they are not decisive, it will be difficult to stop until the contract as a whole is rejected on the ground that it merely represents what the parties said, rather than what they did. There is no reasonable theory which will justify picking and choosing from among the many provisions of the contract only such expressions of intention as will support a given thesis.

The true rule is that the intendment of the contract must be derived from a construction of *all* its provisions. Those provisions include, primarily, statements of intention with respect to the allocation of powers and duties. Secondarily, there are statements of the nature of the relationship in-

tended. Neither are decisive of the relationship which actually existed. Ultimately, that may depend on what the parties did in actual practice.

Roberts v. *U. S. S. B. Emergency Fleet Corp.*, 240 N. Y. 474.

However, in the absence of any evidence that the parties departed in actual practice from the allocation of powers set forth in the agreement, the allocation of powers in the agreement is decisive of the nature of the relationship resulting. There is nothing else on which to depend. Moreover, statements with respect to the nature of the relationship intended, while not decisive, are relevant. It is a reasonable inference that the parties intend to allocate power in accordance with the necessities of the relationship which they say they intend. In case of ambiguity in the words which allocate power, their true meaning can be ascertained by reference to the words which describe the relationship intended.

In the case at bar the statement of intention with respect to the nature of the relationship between the United States and the master, coupled with those showing the intention with respect to the allocation of power, shows conclusively that the General Agent was not in control. When it was provided that the master "shall be an Agent and employee of the United States, and shall have and exercise full control, responsibility, and authority with respect to the navigation and management of the vessel" the parties were not merely resorting to the unnecessary trouble of defining a master's function. Instead, they were allocating power as between the United States and the General Agent. The words were used to foreclose the agent from physical control of the vessel.

If the contract had said that the General Agent should have no power to direct or control the master, there could not have been any question that control was reserved to the United States. Actually, the contract said the equivalent.

In the first place, it placed control in the hands of the master, thus depriving the General Agent of control, unless the General Agent controlled the master. In the second place, it negatived an intent that the General Agent should control the master, by describing the master's control as full—*i. e.*, exclusive—and by describing him as an employee of the United States—*i. c.*, not of the General Agent.

Mr. Justice Douglas' opinion, however, rejects *in toto* the declarations of the parties as to the relationship intended. It ignores their declarations with respect to the allocation of power.

THE CASE OF *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 AND MR. JUSTICE DOUGLAS' ERRONEOUS APPLICATION OF IT.

The second argument of Mr. Justice Douglas involves an application of the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575. This argument proceeded by way of three steps to its ultimate conclusion. The steps were as follows:

First. In the *Brady* case the "managing agent" was referred to as an "operator". (328 U. S. 707, 737).

Second. Any agent, such as the respondents, who contracts with the United States to perform business services respecting a United States-owned vessel is to be identified with the "operator" in the *Brady* case, and also referred to as an "operator". This means that the functions per-

formed by the "operator" in the *Brady* case were the same as those performed by the "operator" in the *Hust* case. (328 U. S. 707, 737).

Third. The "operator" in the *Brady* case had physical possession of the vessel. (328 U. S. 707, 737).

Ergo: It follows that the "operator" herein had physical possession.

The second and third steps of this argument are unsound.

The second step is unsound because it assumes the conclusion which the argument is designed to prove. That conclusion is assumed when the General Agent is referred to as an "operator". It may be granted that, if it be assumed that the General Agent was an "operator", it will be difficult for anyone, as Mr. Justice Douglas found it to be, "to see how the functions of the private operator were in any way changed under this agreement * * *". (328 U. S. 707, 737). The very word "operator" is frequently used to denote physical operation and control.

To paraphrase the words of Mr. Justice Douglas' opinion we may say: "If a court could, by the choice of a label, determine these questions of responsibility to third persons, the problem would be simple". (328 U. S. 707, 736).

It is true that labels do not solve legal or factual questions. Labelling the General Agent as an "operator" merely begs the question whether he was in control or not.

The third step is unsound because it assumes that this court held in the *Brady* case that the "managing agent" involved therein was an "operator"—i.e., was in control of the vessel as such and employed the crew. The fact is that this court expressly refused to pass on this question, although counsel requested it.

One of the points of the respondent in the *Brady* case was entitled as follows:

> "Roosevelt Steamship Company was not the employer of the negligent member of the crew who committed the tort."

As to this, Mr. Justice Douglas, who wrote the opinion in the *Brady* case, said (317 U. S. 575, at 585):

> "Whether a cause of action against respondent has been established is, of course, a different question, as the issues involved in Quinn *v.* Southgate Nelson Corp., *supra*, indicate. The Circuit Court of Appeals did not reach that question. Accordingly we reverse the judgment and remand the cause to it."

After the decision in the *Brady* case, the Circuit Court of Appeals decided that a cause of action had been established against Roosevelt Steamship Company. *Decision unreported. See p. 129 of transcript of record filed in connection with Roosevelt Steamship Company's petition for certiorari, which was denied at 319 U. S. 763.* The Circuit Court's decision was made on the authority of a previous decision of the court—*i.e., Quinn* v. *Southgate Nelson Corporation,* 121 F. (2) 190, Cert. Den. 314 U. S. 682.

Thereafter, Roosevelt Steamship Company filed a petition for certiorari asking this court to hear and determine the following questions:

> 1. What is the status, as respects the employment of the crew of a United States owned vessel, of a person or a corporation who agrees, as agent for the United States, to perform services for the United States in the operation of the vessel, whether he be a "Managing Agent", as in the contract involved in the case at bar, or a "General Agent", as in the modified contract currently used by the War Shipping Administration?

2. Is such status of the agent a matter which can and should be stated as a matter of law, or is such status a factual matter, which must be permitted to depend for solution on a finding of fact in each case, with accompanying variation in the result from case to case?

3. If such status of the agent can and should be stated as a matter of law, is the agent the sole employer of the crew or is the United States the sole employer of the crew?"

The petition for certiorari in the *Brady* case, accordingly, set forth that the managing agent was not the "operator" in the sense that it controlled the vessel and employed the crew, and that the inferences to be drawn from provisions of the contract requiring it to "man" and "operate" the vessel were nullified by other provisions of the contract showing, on a reading of the contract as a whole, that the managing agent was required merely to perform certain business services, including the furnishing (but not the employing) of the crew.

This petition was denied, 319 U. S. 763.

In view of the foregoing, it is incorrect to construe the *Brady* case as a decision by this court that the managing agent in that case employed the crew or controlled the vessel. It is also incorrect to refer to the agent in either the *Brady* case or in this case as an "operator", if one means to imply by that term that he was an operator in the usual commercial sense. The matter of the agent's status with respect to crew and vessel was expressly and deliberately avoided by the court.

The holding of the *Brady* case was simply that, *if the managing agent was an "operator" in the usual commercial sense, and, so, was liable for the tort which had occurred,* he was not immunized by the Suits in Admiralty Act merely because he was acting for the United States.

Neither the *Brady* case, nor the denial of certiorari, decided anything with respect to the substantive rights of the public, including seamen, against the managing agent. They merely served to leave unresolved the question which had existed for years as to the status of the managing agent and its consequent liability, if any, to the general public and members of the crew. That doubt had arisen long before the *Brady* case was ever heard of in connection with the decision of the following four cases:

Roberts v. *U. S. S. B. Emergency Fleet Corp.*, 240 N. Y. 474;

City of Los Angeles v. *Los Angeles Pacific Navigation Co. et al.*, 84 Cal. App. 413 (1927); 1927 A. M. C. 1781;

Quinn v. *Southgate Nelson Corp.*, 121 F. (2) 190, (1941), Cert. Den. 314 U. S. 682;

New York & Cuba Mail Steamship Co. v. *United States*, 12 F. (2) 348 (1926); Cert. Den. 273 U. S. 719.

The *Roberts* case decided that the contractual provisions which required the agent to man and operate the vessels did not, necessarily, mean that the agent was the operator in the sense that he controlled the vessel and employed the crew. The *City of Los Angeles* case held squarely that the managing agent was not the "operator" in this sense. The *New York & Cuba Mail Steamship Co.* case strongly implied that he was not. It was only the *Quinn* case which held to the contrary.

The question with respect to the status of an agent, left unresolved by the denial of the petition for certiorari in the *Brady* case, thus persisted. It has persisted down to the present time. It is the question involved in this case. Here,

however, the text of the agreement is different from that in the *Brady* case and the other cases referred to above. It goes much further than the old agreements in making clear that the agent was not in control of the vessel. Furthermore, there is in this case other evidence which was not in the *Brady* case or even in the *Hust* case as to the actions and intentions of the two parties to the agreement, which emphasizes the fact that the agent was not in control.

Therefore, it is not consistent with good reason to make the decision of this question depend in any respect on an assumption as to what was the status of the managing agent in the *Brady* case. Such questions were not decided by declining to decide them and, then, assuming that they were decided.

It offends reason doubly when an attempt is made to justify the assumption by referring to the General Agency contract as involving a mere change in form. This assumes that both contracts provided for the same kind of operation—*i.e.*, operation by a private operator. As already demonstrated, this court declined, on every occasion when it had an opportunity, to declare whether peace time operation was private operation or operation by the United States.

Nevertheless, if it should be thought desirable that the issue in this case should also depend on assumptions, rather than proof, then why not assume that the operation involved in the Brady case was operation by the United States? An assumption of governmental operation is, at least, as valid as an assumption of private operation. On the basis of such an assumption those provisions of the General Agency Contract which show operation by the United States would not then appear as changes designed to disguise the true nature of the operation, but as changes designed to make doubly sure that some courts would not again misconstrue the actual intent of the parties.

Neither private operation nor Governmental operation forms an indispensable pattern for the operation of Government-owned ships. The Suits in Admiralty Act contemplated both kinds of operation—*i.e.* operation *by* the United States and operation *for* the United States. 46 U. S. C. 741. Thus, in all cases it is a question as to which method of operation was chosen by the United States.

Actually, if one is to make any assumption at all, there is more to recommend the view that the operation in the Brady case was operation by the United States. The great weight of authority of the decided cases supports this view. In addition to the cases already referred to, see the following:

Cox v. *Lykes Bros. and United States Shipping Board Emergency Fleet Corporation*, 237 N. Y. 376 at 383;

United States Shipping Board Emergency Fleet Corporation v. *O'Shea*, 5 Fed. (2d) 123;

The Panola, 1925 A. M. C. 1173 (C. C. A., 2nd Cir.);

Florida, etc. Co. v. *U. S. Shipping Board Emergency Fleet Corporation*, 300 F. 169; reversed on other grounds after rehearing, 3 F. (2nd) 314;

Mallory S. S. Co. v. *Garfield*, 10 Fed. (2nd) 664 (C. C. A., 2nd Circuit);

The Hudson, 1925 A. M. C. 106, New York Supreme Court, affirmed without opinion, 214 App. Div. 717.

In view of the foregoing, if one assumes, as Mr. Justice Douglas appears to have done, that the operation involved in the Brady case was operation by a private operator, and then uses this assumption as a point of reference for judg-

ing the effect of the General Agency Agreement, it is tantamount to a refusal to permit parties to make such contracts as they intended.

It would be better to avoid assumptions entirely, and to ascertain the facts by a trial. That is the way in which the facts with respect to wartime operation were ascertained in the case at bar. If the facts in the case of the old peacetime operation are needed in order to decide the question of the present wartime operation, they should be ascertained in the same way. However, they are not contained in the present record.

CERTAIN COLLATERAL MATTERS REFERRED TO BY MR. JUSTICE DOUGLAS IN HIS OPINION IN THE HUST CASE.

Mr. Justice Douglas' opinion refers to two "collateral phases" of the General Agency Contract. It is said that they suggest that the General Agent performed "managerial functions". The first of these provisions is contained in Article 5, where, with respect to vessels allocated before February 25, 1942, it was provided that (R. 342):

> "• • • compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942."

The second provision is Article 7, wherein it was provided that the United States shall reimburse the General Agent,

> "for all crew expenditures • • • in connection with the vessels hereunder, including, without limitation,

all disbursements for or on account of * * * damages or compensation for death or personal injury or illness * * * any payments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits of said plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise" (R. 344).

The quoted portions of Article 5 are inapplicable in this case. The *SS. Everagra* was not allocated until May 27, 1943.

Irrespective of this, it is difficult to see how the retention of the Maritime Commission's standards in fixing General Agents' compensation can suggest that the General Agent controlled or managed the vessel. Of course, if one assumes that the only method of compensation followed by the Maritime Commission was compensation in respect of operation by private operators, rather than operation by the United States, such an inference is remotely possible. But, here, again, there is the same unwarranted assumption that operation of Government vessels during peacetime was exclusively operation by private companies. Moreover, Article 5 shows by its context that operation under the Maritime Commission was not exclusively private operation. It refers not only to compensation payable in the case of bareboat charters, but in case of "commitments".

Likewise, it is difficult to see how Article 7 can show that the General Agent was the manager of a vessel. The disbursement of money for the United States in payment of its obligations is no more the performance of a managerial

function than a bank's payment from a checking account on the order of its depositor. The General Agent's function was exactly the same. This appears from the fact that the expenditures in question were referred to as "disbursements". The primary meaning of that word is the paying out of Government money. Article 7 provides that the United States "may advance moneys to the General Agent to provide for disbursements hereunder * * *" R. 345.

Moreover, there is nothing in the General Agency contract indicating that the parties contemplated that the General Agent was to make the payments in question because he was an employer and so was obliged to make them. The only words which even faintly indicate that the General Agent might be required to make any of these payments in a capacity other than as a disbursing officer of Government moneys was the provision with respect to Social Security taxes, wherein reference was made to payments which the General Agent might be required to make as "agent or otherwise". Irrespective of what the meaning of this provision was when the contract was originally drawn, it is clear that, as of the time when the Steamship *Everagra* was allocated to the respondents, there was no requirement that the respondents should pay Social Security taxes in any capacity other than as an agent. This appears from Internal Revenue Code, Title 26, §1426, (i) which took effect on March 24, 1943, two months before the *SS. Everagra* was allocated to the respondents. Therein it was provided that the Social Security Act should apply to

> "* * * service * * * on or in connection with any vessel by an officer or member of the crew as an employee of the United States employed through the War Shipping Administration, or, in respect of such service performed before February

> 11, 1942, the United States Maritime Commission * * *. The Administrator, War Shipping Administration, and the United States Maritime Commission, and their agents or persons acting on their behalf or for their account, may, for convenience of administration, make payments of the tax* * *".

Thus, Congress recognized, for the purposes of the Social Security Act, that seamen employed on Government-owned vessels, both before and after the war, were employees of the United States, and not of the agents.

Mr. Justice Douglas' final conclusion was that the General Agent performed all of the managerial functions relating to the undertaking, and that this constituted control of the vessel. Obviously, this went too far. The performance of managerial functions, even when it includes the function of directing the master of a vessel, does not, necessarily, constitute control of the vessel. Whether it does or does not depends upon whether the managerial functions are performed vicariously or not. In some cases where managerial functions are performed by an agent, the principal is in control, and *the agent is not.*

See

> *Restatement of Law of Agency,* §220; Comment on Sub-section 1-A; §358, Comment on Subsection (1) a.

Mr. Justice Douglas' conclusion was also erroneous because the premise was incorrect. The General Agent did not perform *all* managerial functions. The General Agent was limited to the performance of managerial functions relating to the business of the vessel as distinguished from managerial functions relating to the vessel itself. And he performed only *some* of the managerial functions relating

to the business itself. As already noted, the Berth Agent performed some of them. So did the War Shipping Administration itself.

After all, the claim that the General Agent physically controlled the vessel, when it was being used by the United States as an instrument of war, is violative of common understanding. The "undertaking" with which we are concerned herein was the war with Germany. The war was the public undertaking of the United States, not the private undertaking of the respondents.

Congress showed that it clearly understood this when it referred to seamen employed on its vessels as employees of the United States, and made the United States liable as an actual, not a technical, employer for the payment of Social Security taxes. When Congress stated the reality so explicitly, a court should not be at pains to obscure it.

Three Justices of this court have already so declared.

Petitioner's Brief.

As already indicated, petitioner relies for the most part on excerpts from the opinion of Mr. Justice Douglas in the *Hust* case. However, he also refers to certain provisions of the General Agency contract and the regulations made thereunder, not referred to in that opinion, which, it is claimed, show that the General Agent had physical control of the vessel.

It will be found that petitioner misconstrues the meaning of these provisions and that the reason for this is that he makes no distinction between the physical phase and the business phase of the operation of vessels. As already indicated, this distinction was the fundamental concept of the General Agency contract.

In an effort to support an inference that, notwithstanding the clear provisions of the contract, the General Agent was in physical control of the *SS. Everagra,* petitioner refers to a number of isolated phrases which have been culled from the General Agency contract and from the maze of orders and regulations issued pursuant to it. Thus, on page 20 of petitioner's brief reference is made to Article 16 of the General Agency contract, wherein the United States agreed to indemnify the General Agent against claims for injury to persons or property "arising out of, or in any way connected with, operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder." Petitioner argues that this shows that the contract contemplated physical operation of the vessels by the General Agent. The inference is unfounded.

The operation referred to in Article 16 is operation by the United States. The General Agent, without being in control of the vessel, can be liable for injury to persons or property "arising out of, or in any way connected with, operation or use of said vessels" by the United States. It was with regard to such liabilities, among others, that the parties were contracting.

Thus, a General Agent who, in the performance of his obligation under the contract to supply a vessel, should contract with someone to supply it with defective materials or improper food, which might lead thereafter during the operation of the vessel by the United States to injury either to crew or to non-members of the crew, would undoubtedly be liable for his negligent act. In Article 16 of the United States has contracted to indemnify the General Agent against such claims, but, that is not to say that the United States has indicated by such provision that the General Agent was to control the physical operation of its vessels.

In the case at bar, we are not concerned with any act of a General Agent. The liability claimed against the General Agent is that he failed to act, having an alleged duty to the petitioner to do so.

Petitioner's brief refers on page 21 to a letter written by the War Shipping Administration to General Agents, dated December 4, 1943. This letter refers to "repairs on vessels operated by your company for account of War Shipping Administration." This, argues the petitioner, is another evidentiary item showing that the respondents, as General Agents, were in charge of the physical operation of the vessel. Here, again, the inference is unfounded. The operation referred to is the business phase of the total operation. The subject of the letter was maintenance and repair regulations. These have to do with the "arrangements" for repairs which are confided to the care of the General Agent, pursuant to the contract.

On pages 21 and 22 of petitioner's brief, he refers to Regulation No. 59, dated May 31, 1943. Here, the phraseology to which petitioner calls attention is: "All vessels assigned and delivered for operation under General Agency Agreement as of May 1, 1943". This statement is wholly consistent with the underlying concept of the General Agency Agreement as heretofore set forth. Pursuant to that concept, vessels were assigned and delivered for operation. However, they were *delivered* to the captain of the vessel for physical operation. They were *assigned* to the General Agent so far as concerns the business phases of operation.

On page 22 of petitioner's brief, reference is made to War Shipping Administration Directive No. 1, in which it is stated that masters of vessels have been instructed to report breaches of discipline to the "operating agent" of

the War Shipping Administration. Here, again, the plaintiff fails to distinguish between the physical phase of operation and the business phase of operation.

So far as concerns disciplinary matters, the General Agent was the proper one to whom such complaints as to discipline should be referred. The General Agent was charged with the duty of procuring crews. It was essential that the General Agent, in the performance of such duty, should be acquainted with the records of those seamen whose records were bad. But, that is not to say that it was ever the intention of the United States or the General Agents that the General Agents should have control of the actual physical operation of vessels.

On page 24 of petitioner's brief, reference is made to Directive No. 1, issued on October 8, 1942, wherein General Agents are required to place a copy of a certain letter "in the hands of all masters and officers in your employ."

Obviously, the writer of Directive No. 1 was not attempting to change the definite provisions of the General Agency contract when he referred to masters as being in the employ of General Agents. Neither was he attempting to contradict the intendments of the contractual provisions respecting the "procurement" and "engagement" of officers. The phraseology is that of a shipping man to whom there seemed no necessity for the purpose in hand of preserving the distinction observed in the contract between the physical phase of operation and the business phase of operation.

On page 25 of his brief petitioner refers to Operations Regulation No. 4, wherein it is provided that General Agents shall assign to new vessels a Master, Chief Mate, Chief Engineer, and First Assistant Engineer.

Plaintiff says that "assign" means "hire" and that this modifies the contract.

"Assign" does not mean "hire". The General Agency contract requires the General Agent only to procure the officers for engagement by the master. Assignment refers to their being told to proceed on particular vessels.

On page 28 of petitioners' brief, reference is made to Plaintiff's Exhibit 8, wherein General Agents are required to supervise to completion all maintenance and insurance repairs. This, says the plaintiff, shows that General Agents had a substantial measure of control over vessels.

It shows nothing of the kind. Supervision of maintenance and insurance repairs means simply that the General Agent has to see that the repair yards do their work in accordance with their contracts with the United States. This is part of the business phase of operation.

It is in connection with the construction of the meaning of much of the foregoing data that the Appellate Division's reversal on questions of fact has particular relevance. *Supplemental additional papers to the Court of Appeals*, page 6. It was the Appellate Division's function to decide, as a question of fact, the actual meaning of these writings on which the petitioner relies. The Appellate Division found as a fact that they did not spell control.

Respondents' position with respect to the actual decision in the *Hust* case is that it is not in any respect determinative of the issue in the case at bar. For that reason respondents will not have any occasion in this brief to show that the decision made by only four justices in a court consisting of seven was unsound. If it should be thought that the point decided in the *Hust* case as to crew members has any bearing on the issues involved in this case, which concerns strangers respondents' position is that the dissenting opinion written by Mr. Justice Reed, and concurred in by Mr. Justice Frankfurter and Mr. Justice Bur-

ton, correctly stated the law. In that event, petitioner asks leave to file an additional brief dealing with that question, in which respondent will show that the decision of Mr. Justice Rutledge is based upon a misconception as to the nature of the operation of the Government-owned ships involved in the *Brady* case and, generally, before the war.

Conclusion.

The order of the Court of Appeals should be affirmed.

Respectfully submitted,

Cletus Keating,
Vernon Sims Jones,
Raymond Parmer,
Attorneys for Respondents.

No. 625.

In the Supreme Court of the United States

OCTOBER TERM, 1946

PETER CALDAROLA, PETITIONER

v.

MOORE-McCORMACK LINES, INC., AND GERDA ECKERT AND THOR ECKERT, JR., PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF THOR ECKERT & CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

	Page
Introduction	1
The interest of the United States	4
Argument:	
I. The general agent was not the owner *pro hac vice* in possession and control of the S. S. *Eeragra*	6
II. The liability of the general agent should depend on whether he has negligently breached his undertaking to maintain the ship	18
Conclusion	23
Appendix	24

CITATIONS

Cases:	
American Stevedores, Inc., v. *Porello*, No. 69, this Term, decided March 10, 1947	2
Beaver, The, 219 Fed. 139	13
Board of Commissioners v. *United States*, 308 U. S. 343	21
Brady v. *Roosevelt S. S. Co.*, 317 U. S. 575	2, 9, 19, 20
Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372	21
Clearfield Trust Co. v. *United States*, 318 U. S. 363	21
Colonna Shipyard v. *Bland*, 150 Va. 349	21
Cullings v. *Goetz*, 256 N. Y. 287	20
Dahms v. *General Elevator Co.*, 214 Cal. 733	22
Del Norte, The, 119 Fed. 118	13
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239	20
Hagar v. *Clark*, 78 N. Y. 45	9
Hudson v. *Moonier*, 102 F. 2d 96	22
Hust v. *Moore-McCormack Lines*, 328 U. S. 707	12, 13
Intagliata v. *Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365	20
Labor Board v. *Hearst Publications*, 322 U. S. 111	13
Mexico v. *Hoffman*, 324 U. S. 30	5
Murray v. *American Export Lines*, 53 F. Supp. 861	22
Murray v. *Cowherd*, 148 Ky. 591	22
Navemar, The, 303 U. S. 68	5
Osborne v. *Morgan*, 130 Mass. 102	22
Pedersen v. *Stockard S. S. Corp.*, 268 App. Div. 992	22
Pipitone v. *Standard Fruit & S. S. Co.*, 270 App. Div. 844	22
Quinn v. *Southgate Nelson Corp.*, 121 F. 2d 190, certiorari denied, 314 U. S. 682	9
Reed v. *United States*, 11 Wall. 591	9

Cases—Continued	Page
Royal Indemnity Co. v. *United States*, 313 U. S. 289	21
Seas Shipping Co. v. *Sieracki*, 328 U. S. 85	2, 20
United [illegible] *Shea*, 152 U. S. 178	9, 13
Van [illegible] *ican Steam Boiler Ins. Co.*, 52 N. J. L. [illegible]	22
Vila [illegible] *Co.*, 69 F. Supp. 286	13
Statutes:	
Employe[illegible]ation Act, 39 Stat. 742, 5 U. S. C. 751 *et seq*	15
Internal Revenue Code, 26 U. S. C. 1426	5, 14
Merchant Marine Act, 1936, 46 U. S. C. 1194, 1197 (c)	7
Public Vessels Act, 1925, 46 U. S. C. 781 *et seq*	3
Social Security Act, Sec. 209, 42 U. S. C., Supp. V 409 (o)	5, 15
Social Security Act Amendments of August 10, 1946, c. 951, P. L. 719, 79th Cong., 2d Sess	5, 16, 17
Suits in Admiralty Act, 1920, 46 U. S. C. 741 *et seq*	3, 5
War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App., Supp. V, 1291	5, 14
Miscellaneous:	
2 American Jurisprudence, *Agency*, § 333	22
2 Benedict, *Admiralty* (6th ed.) p. 93	3
Bouvier, *Law Dictionary* (1934)	8
Compilation of Standard Contract Forms of the War Shipping Administration, compiled by the Merchant Marine and Fisheries Committee of the House of Representatives (Document No 4, 1945)	3, 11
46 C. F. R., 1943 Cum. Supp., 11427 *et seq*	3, 10, 11
General Admiralty Rule 46, 316 U. S. 717	5
Hearings before the House Ways and Means Committee on H. R. 3736, 79th Cong., 1st Sess., pp. 703–705	16
H. Rep. 107, 78th Cong., 1st Sess., pp. 2, 15	15
Issues in Social Security, Report to the Ways and Means Committee of the House of Representatives	16
1 Mechem, *Agency* (2d ed.), 1914, pp. 1086–1092	22
1 Parsons, *Shipping* (1869), pp. 109–114	8
2 Parsons, *Shipping* (1869), pp. 3–13	8
Restatement, *Agency*:	
§ 79 Comment a	14
§ 354 Comments a, c, and d	22
§§ 358, 405	13
Restatement, *Torts*	21, 22
Robinson, *Admiralty* (1939), pp. 594–596, 612, 614	13
S. Rep. 62, 78th Cong., 1st Sess., pp. 5–6	15
United States Employees' Compensation Commission 28th Annual Report, 1944, p. 5	15

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 625

PETER CALDAROLA, PETITIONER

v.

MOORE-MCCORMACK LINES, INC., AND GERDA ECKERT AND THOR ECKERT, JR., PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF THOR ECKERT & CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States files this memorandum *amicus curiae* because of the importance of the problem presented in the operation of government-owned shipping, whether in peace or in war. The United States Maritime Commission has requested the Acting Solicitor General to advise the Court of the Government's interest and of its position respecting the issues involved.

INTRODUCTION

Petitioner was an employee of Jarka Corporation, a contracting stevedore, which was en-

gaged under a general contract with the War Shipping Administration (as representative of the United States) to stevedore the S. S. *Everagra* and other vessels owned and operated by the United States (R. 259). Respondent was a ships husband or general agent of the United States in the operation of the Government's fleet of cargo vessels employed under an agreement with the United States represented by the War Shipping Administration to act for it "as its agent and not as an independent contractor to manage and conduct the business of vessels assigned to it" (R. 362). Pursuant to the agency agreement the United States is, or may be, obligated to reimburse the general agent for money paid in resisting or settling claims arising out of duties performed under the agreement.[1]

In the circumstances of this case petitioner was entitled to recover from the owner of the vessel without proof of negligence by a suit in admiralty on the ground that the ship was unseaworthy due to the defective boom. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. For the purposes of such a suit we believe that the United States would unquestionably be regarded as the owner of the vessel. See *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 577, 579–582; *American Stevedores, Inc.* v.

[1] The United States procured protection and indemnity insurance covering risks of the character involved in the present case and respondent is represented by private counsel retained by the Government's P and I underwriters (R.).

Porello, No. 69 this Term, decided March 10, 1947.[2] In that proceeding petitioner also could have joined the respondent general agent as well as any other persons whom he might think to be liable, or could have filed separate libels and had all of the suits consolidated for trial (2 Benedict, Admiralty, 6th ed., pp. 93, 553). Instead, petitioner chose to sue respondent in the State courts where, although he could not join the United States, he could have his damages assessed by a jury. In such a proceeding, unless it could be established that respondent and not the United States was owner *pro hac vice* in possession and control of the vessel, it was necessary for petitioner to prove a negligent breach of a duty owing from respondent to himself.

The New York Court of Appeals held that the United States and not respondent was the owner in possession and control of the vessel. It further held that respondent general agent owed no duty to petitioner to make the vessel safe. The court

[2] Jurisdiction for such a suit would exist under the Suits in Admiralty Act, 1920 (46 U. S. C. 741 *et seq.*), if the vessel were employed as a merchant vessel; under the Public Vessels Act, 1925 (46 U. S. C. 781 *et seq.*), if employed as a public vessel. Standard forms of the contracts, charters, and insurance arrangements are contained in *Compilation of Standard Contract Forms of the War Shipping Administration*, compiled by the Merchant Marine and Fisheries Committee of the House of Representatives (Document No. 4, 1945). Article 8 of the general agency agreement, containing the provisions respecting insurance, was omitted in printing the record. It is found at pp. 331–332 of Document 4 and 46 C. F. R., 1943 Cum. Supp., p. 11429.

accordingly ordered petitioner's suit dismissed and it is to review that decision that this Court granted certiorari. The United States is vitally concerned as to whether itself or respondent is held to be owner *pro hac vice* in possession and control of the *Everagra*. The interests of the United States are not materially affected by the question of whether the duty owed by respondent to the United States to use due diligence to maintain the vessel in a safe and seaworthy condition should be held to extend also to the petitioner.

THE INTEREST OF THE UNITED STATES

In numerous situations it is of the greatest importance that the United States and not its general agents be held to be the owner in possession and control of its cargo vessels. If the general agent be held to be the owner *pro hac vice* in possession and control, the United States will be required to defend before juries in the state courts suits brought against its general agents on account of negligent navigation by the master and crew of its cargo vessels. In time of war such collisions commonly involve convoy and routing instructions, the details of swept channels and other harbor defense procedures, secret detection equipment and many other matters of the highest secrecy. During the war this Court by special admiralty rule provided for the impounding of pleadings and the hearing of cases *in camera* in order to protect the public interest in these re-

spects.[3] No such action could be effective in the case of cases tried before juries in the state courts.

If the general agent rather than the United States is owner *pro hac vice* in possession of government cargo vessels, the vessels are not entitled to enjoy the immunity of government vessels in foreign ports. Cf. *Mexico* v. *Hoffman*, 324 U. S. 30, 37–38; *The Navemar*, 303 U. S. 68, 74. Although the United States recognizes civil responsibility for such vessels, it does not waive their sovereign immunity. See 46 U. S. C. 747. Likewise, in this country, the vessels would not be entitled to immunity from regulation and taxation by local governments in cases where vessels privately owned and possessed are subjected to such regulation and taxation.

The last consideration is particularly significant in connection with the question of the liability of the Government, through its general agents, for state unemployment insurance taxes. Congress has made special statutory provision for old age and survivors' insurance benefits[5] and for unemployment compensation insurance benefits[6] for seamen employed by its general agents

[3] General Admiralty Rule 46 as amended June 8, 1942 (316 U. S. 717). Such risks are not insured by the Government and the defense must be conducted by attorneys of the Department of Justice.

[4] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App., Supp. V, 1291; 26 U. S. C., Supp. V, 1426 (i); 42 U. S. C., Supp. V, 409 (o)).

[5] Social Security Act Amendments of August 10, 1946, c. 951, P. L. 719, 79th Cong., 2d Sess.

on behalf of the War Shipping Administration. If it be held that the general agent and not the Government is owner *pro hac vicè* in possession and control of the Government's vessels, general agents will be required to collect additional taxes from seamen on government vessels and from the United States under the terms of the agency agreement and pay over the same to the state government having jurisdiction over the general agent. And all this without any corresponding benefit since Congress has made special provision for such cases.

ARGUMENT

I

THE GENERAL AGENT WAS NOT THE OWNER *PRO HAC VICE* IN POSSESSION AND CONTROL OF THE S. S. *EVERAGRA*

Consideration of the agreements and regulations of the War Shipping Administration and the applicable statutes of Congress makes it plain that respondent acting as general agent for the United States had no possession or control over the physical operation of the SS Everagra. It is made equally plain that respondent had no authority or control over the conduct of the master and crew in the management of the vessel and its equipment so as to be liable for their acts under the doctrine of *respondeat superior*. It follows that respondent cannot be held to have been the owner *pro hac vice*.

1. For many years the Government has been engaged in peace and in war in the operation of

a fleet of cargo vessels.[6] In conducting these operations the United States, like private shipowners, has made use of the two coordinate classes of agents for the conduct of the shipping business—the ship master and the ship's husband—each responsible directly to the United States as owner for the matters with which they are respectively entrusted and neither exercising control or authority over the other. It employs experienced ship masters as its agents for the physical operation and management of its vessels afloat and experienced steamship operators as ship's husbands or general agents for the business operation and fiscal and economic management of the affairs of its vessels ashore.

The masters employed by the United States to navigate and physically manage its vessels afloat are currently employed on the terms of the cus-

[6] The Merchant Marine Act, 1936, directs the United States Maritime Commission to arrange for the operation of its vessels by private steamship companies under bareboat charters. In such private operation the steamship companies are, of course, owners *pro hac vice* in possession and control of the vessels. In order to assure operation of lines in unprofitable trades, however, it is provided that if it should be impossible to find private operators willing to operate the vessels under bareboat charter, they may be temporarily operated by the Commission itself through such private operators and upon such operating agreements as the Commission shall find advantageous. (46 U. S. C. 1194, 1197 (*c*).) While the end of war-time conditions will result in the return of most vessels to private operation, it seems not impossible that the Government may for many years be required to operate lines in certain unprofitable trades.

tomary maritime usages and the general maritime law.[7] They accordingly have physical possession, custody and control of the vessels afloat as the direct representatives of the owner, the United States. The operators employed to husband the vessels ashore are designated "general agents." They are currently employed on terms substantially in accord with maritime custom[8] and fully described in the standard form of agency agreement designated "GAA–4–4–42" (R. 362–379). They are accordingly the channel through which instructions from the United States as owner (represented by War Shipping Administration) are relayed to the masters of the vessels whose business operations have been assigned to them.

The duties assigned to general agents respecting the vessels themselves make it abundantly plain that the United States has not conferred upon them the possession and control of the vessels. Nowhere in the agreement is there found any language amounting to a demise or delivery to the general agent of the physical possession and control of the vessels to be assigned to him. On the contrary the agreement makes it plain that the master as the direct agent of the United States is in exclusive possession of his ship.[9] And it is well

[7] See 2 Parsons, *Shipping* (1869), pp. 3–13; Bouvier, Law Dictionary (1934), "Master of a Ship."

[8] See 1 Parsons, *Shipping* (1869), pp. 109–114; Bouvier, Law Dictionary (1934), "Ship's Husband."

[9] As pointed out by the court below (R. 13) there is a striking difference in the standard form of general agency

established that where the general owner thus retains the possession, command and navigation of a vessel, the agreement does not constitute a demise, divesting the general owner and making the other party owner *pro hac vice*, and the entire legal responsibility of ownership remains in the general owner. *Reed* v. *United States*, 11 Wall. 591, 600; *United States* v. *Shea*, 152 U. S. 178; *Hagar* v. *Clark*, 78 N. Y. 45.

Respondent and other general agents are employed by the United States to husband its vessels

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agreement and the special form involved in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. C. A. 2), certiorari denied, 314 U. S. 682, whereby the United States turned over the vessels themselves to be operated by a cost-plus contractor designated "Managing Agent" and the latter, and not the United States, manned the vessel with a master and crew employed as its own agents. That agreement (see Record in *Brady* v. *Roosevelt S. S. Co.*, (No. 269, October Term, 1942, pp. 21–32) stated, "The Managing Agent has indicated its willingness to undertake the management and operation of the Line, * * *. The Owner hereby designates the Managing Agent as its Managing Agent to manage, operate and conduct the business of the Line" (Art. 1); "The Managing Agent *shall manage and operate the said vessels* exclusively under the trade name American Pioneer Line" (Art. 4); "The Managing Agent agrees to *man, equip, victual, supply and operate* the vessels, subject to such restrictions and in such manner as the Owner may prescribe * * *. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner" (Art. 7); "The Owner may terminate this agreement * * * in case of * * * any assignment, transfer, agreement or arrangement whereby the *management or operation of the above described Line or vessels* shall be divested from the Managing Agent" (Art. 25).

under a standard form of general agency agreement "as its agent and not as an independent contractor to manage and conduct the business of vessels assigned to it" (Art. 1).[10] The general agent agrees to conduct the business of the vessels "for the United States, in accordance with such directions, orders, or regulations" as the United States may prescribe (Art. 2). The general agent undertakes to "maintain the vessel in such trade or service as the United States may direct" (Art. 3 A (a)); "equip, victual, supply and maintain vessels subject to such directions, orders, regulations and methods of supervision and instruction as the United States may from time to time prescribe" (Art. 3 A (c)); "arrange for the repair of vessels * * * including maintenance and voyage repairs and replacements" and "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels" (Art. 14).

The provisions whereby general agents assume no personal responsibility and have no financial interest in the affairs of the vessels other than their fees confirm that the United States and not the agent is in exclusive control. Thus the agreement provides that general agents shall "issue or cause to be issued to shippers customary freight contracts and bills of lading" and "all bills of lading shall be issued by the general agent or its agents as agent for the master and the signature

[10] The standard form of agency agreement (GAA-4-4-42), 46 C. F. R., 1943 Cum. Supp., 11427 *et seq.* is set forth in the record at pp. 362–379.

clause may provide substantially that the general agent makes no warranty or representation as to the authority of the United States or the master to enter into the agreement, and that the general agent assumes no liability with respect to the goods described therein or the transportation thereof" (Art. 3 A (c)). The general agent undertakes to "collect all moneys due the United States under this agreement and deposit, remit, or disburse the same" in accordance with regulations to be prescribed by the United States (Art. 3 A (b)).

Because of the possibility that government shipments will so far exceed commercial cargo and passengers that the vessels may not earn expenses, it is provided that "The United States shall reimburse the General Agent * * * for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense" (Art. 7). Moreover, "The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks * * * and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense * * * on account of such risks and liabilities to the extent not covered by insurance" (Art. 8).[104]

[104] Article 8, omitted from the printed record, is published in Doc. 4 (*supra*, note 1), pp. 331–332; 46 C. F. R., 1943 Cum. Supp., p. 11429.

2. Further indicia of ownership and possession of the vessel by the United States are found both in the express language of the contract and the repeated statutory indications of Congressional intent that the master and crew should be regarded as the agents, servants and employees of the United States under the doctrine of *respondeat superior*. Of course this could not be the case if the general agent were held to be the owner *pro hac vice*. We recognize that the law is not bound to accept the terms in which parties describe their relationship. However, when one of the parties is the Government and there are clear and consistent administrative interpretations and legislative enactments accepting the description and legal incidents flowing therefrom, we submit that this Court should not adopt a contrary view.

The circumstance that the crew may be "employees" of the general agent within the technical meaning of that term in the Jones Act (see *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707) [11]

[11] In the *Hust* case a majority of this Court held that a seaman procured by a general agent for service as a member of the crew of a War Shipping Administration vessel is an employee of the procuring general agent within the meaning of the Jones Act. The majority did not decide whether in the circumstances the vessel, together with her master and crew, were so subject to the control of the general agent that the latter was responsible for their acts and the conditions aboard. A minority of the Court (Douglas and Black, JJ) thought the agent had sufficient control of the vessel to be treated as owner *pro hac vice*. 328 U. S. at 734. The

is not dispositive of the question of who their master is within the rule of *respondeat superior.*[12] It seems plain on the contrary that the United States and not the general agent is the master within the rule of *respondeat superior* and that the Government and not the general agent must answer to third parties for their negligent conduct. See Restatement, *Agency,* Sections 358, 405.

In accordance with the immemorial custom touching ships' husbands, it is made the duty of the general agent to procure the master and crew for the vessels assigned to him. But out of abundant caution it is expressly provided that when procured, "The master shall be an agent and employee of the United States and shall have

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minority recognized, however, that there was not a demise of the vessel to the agent (328 U. S. at 738). Demise has always been required to constitute one other than the general owner the owner *pro hac vice. United States* v. *Shea,* 152 U. S. 178, 187; *The Beaver,* 219 Fed. 139 (C. C. A. 9); Robinson, *Admiralty* (1939), pp. 594–596. An owner *pro hac vice* is exclusively responsible for the acts of the master and crew as their principal under the rule of *respondeat superior.* The general owner cannot be held liable. *The Del Norte,* 119 Fed. 118, 119 (C. C. A. 9); *Vitozi* v. *Balboa Shipping Co.,* 69 F. Supp. 286, 288 (D. Mass.); Robinson, *Admiralty* (1939), pp. 612, 614.

[12] See the majority opinion, 328 U. S. at 724, referring to *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 129, where this Court indicated that in respect of remedial statutes (such as are the Labor Relations Act and the Jones Act), "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" are rejected in determining the scope of the term "employee".

and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" and "the officers and members of the crew shall be subject only to the orders of the master" (Art. 3 A (d), R. 363). Masters so employed are accordingly the agents of the United States and not of the employing general agent, who "is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection." See Restatement, *Agency*, Section 79, Comment a.

Congress, with the passage of the War Shipping Administration (Clarification) Act, 1943, has recognized the status of seamen serving on vessels owned by or bareboat chartered to the United States, through the War Shipping Administration, as employees of the United States. By that act Congress conferred upon them certain rights and benefits theretofore possessed by seamen employed by private ship operators but not enjoyed by those employed by the United States through general agents of the War Shipping Administration. Prior to the passage of that act, such seamen as employees of the United States were not engaged in employment covered by the Federal Insurance Contributions Act and were not entitled to benefits under the old age benefit provisions of the Social Security Act. The Clarification Act amended Section 1426 of the Internal Revenue Code (26 U. S. C., Supp. V, 1426 (i)) and

Section 209 of the Social Security Act (42 U. S. C., Supp. V, 409 (o)) so as to cover specifically under the definition of "employment" in those statutes the services performed by seamen employed on vessels owned by or bareboat chartered to the United States and operated by the War Shipping Administration through general agents. Without this action by Congress it was not possible for such seamen to enjoy the benefits which would have been theirs had they been employees of the general agent. The reports leave no doubt that the status of such crew members as employees of the United States was fully recognized.[13]

Prior to the adoption of the War Shipping Administration (Clarification) Act, 1943, *supra*, other government agencies recognized that such crew members were employees of the United States. For example, the United States Employees' Compensation Commission granted benefits to seamen of this class under the Employees' Compensation Act, 39 Stat. 742, 5 U. S. C. 751 *et seq.* See the Commission's 28th Annual Report (1944), p. 5. Similarly the authorities of most of the states which provide coverage for maritime workers in their unemployment compensation laws have refrained from attempting to collect contributions in respect of seamen on vessels operated by the War Shipping Admin-

[13] S. Rep. 62, 78th Cong., 1st Sess., pp. 5–6; H. Rep. 107, 78th Cong., 1st Sess., pp. 2, 15.

istration through general agents, since it is generally understood that such seamen are considered to be federal employees.[14]

Further Congressional recognition of the status of such crew members as employees of the United States is found in the provisions of the Social Security Act Amendments of August 10, 1946, c. 951, P. L. 719, 79th Cong., 2d Sess., which amended the Federal Employment Tax Act expressly to authorize the states to cover under their unemployment insurance laws services performed by seamen on interstate voyages. Several states, including California and New York, had already taken steps to cover such private seamen at least to the extent that their vessels operated from a single state. In order to permit all of the maritime states to join in an interstate agreement providing for the exchange of wage information between the unemployment insurance authorities of the several participating states as a basis for the payment of benefits to seamen serving on vessels operating out of more than one state, it was necessary to amend the federal act so as to authorize the states to cover seamen in the same manner as other employees. Such coverage expressly excluded members of the crews of vessels operated

[14] See *Issues in Social Security*, Report to the Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st Sess., p. 401; Hearings before the House Ways and Means Committee on H. R. 3736, 79th Cong., 1st Sess., pp. 703–705.

by the War Shipping Administration through its general agents. Instead, Congress made specific provision for the payment of benefits to seamen formerly employed by the War Shipping Administration through general agents on vessels owned by or bareboat chartered to the War Shipping Administration and Maritime Commission.

This was accomplished by the addition to the Social Security Act of Title XIII (P. L. 719, c. 951, 79th Cong., 2d Sess., authorizing the Federal Security Administrator to enter into agreements with the several maritime states for the payment of benefits during a so-called reconversion period lasting until June 30, 1949. Under such agreements the states will pay compensation to the seamen as if they were in fact covered under the state law and obtain reimbursement thereof from the Federal Security Administrator. In the absence of such arrangements, the Federal Security Administrator is directed to make such payments directly to the applicant."[15] If it should be held that the general agent and not the United States is the owner *pro hac vice* in possession and control

[15] Payment of these benefits to seamen employed on vessels operated by the War Shipping Administration through general agents is made dependent upon appropriation by Congress for the purpose. At present a dispute exists between the federal authorities and those of the State of California respecting the right of the latter to treat War Shipping Administration seamen as employees of the general agent instead of the United States. In the circumstances no appropriation has been made.

of the vessel, the Government will be faced with the necessity of contributing through its general agents to such state funds retroactively for the entire period of the war, as well as prospectively.

II

THE LIABILITY OF THE GENERAL AGENT SHOULD DEPEND ON WHETHER HE HAS NEGLIGENTLY BREACHED HIS UNDERTAKING TO MAINTAIN THE SHIP

A holding that respondent was not in possession of the vessel nor the employer of the crew within the rule of *respondeat superior* is not incompatible with respondent's liability upon the record now before the Court. The question of liability should be decided on the narrow issue of whether whatever duty respondent owed to the United States to keep the ship in good repair also created a duty to petitioner.

We submit that respondent was under a contractual duty to the United States to exercise due diligence properly to maintain and repair the S. S. *Everagra*. This duty respondent violated if it failed to exercise due diligence to detect and cause to be repaired the defective boom alleged to have caused petitioner's injuries. Under its contract, respondent was not entitled simply to await reports from the *Everagra's* master and officers as to defective conditions aboard which required repairs. It was in exclusive charge of this aspect of the vessel's operation and it was its duty through its marine superintendent, port

captain and port engineer, or other shoreside personnel to make regular inspections to ascertain and discover such defects and have them promptly and properly repaired. The provisions of the general agency agreement and the regulations prescribed under Article 2 thereof make this abundantly plain. For the convenience of the Court they are authoritatively analyzed in a letter from the General Counsel of the Maritime Commission printed in the Appendix, pp. 24–33.

Respondent's duties in no way required that it interfere with the exclusive physical custody and possession of the ship's master as the direct representative of the United States in possession of the vessel. Under its agreement respondent, like every ship's husband, was entitled to go aboard to perform the duties of husbanding the vessel just as the Government's contracting stevedore, Jarka Corporation, was entitled as an implied term of its contract to go aboard to perform the duties of loading and unloading. Neither displaced the possession and control which the ship's master exercised for the United States.

Thus the question of the liability of respondent, as agent, for an independent tort growing out of its own negligence may be presented on the record here. In *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, this Court held that a Customs inspector injured as a result of similar defective maintenance of a government vessel was not prevented by the Suits in Admiralty Act from suing the agent for

the latter's independent tort. Whereas in the case at bar the Government's operating arrangements are such that the United States, through the ship's Master as its direct agent, mans the vessel, in the *Brady* case it was the duty of the steamship company to man as well as to maintain and supply the vessel. Nonetheless the Court expressly reserved the question as to whether in the circumstances of that case a cause of action had been established (317 U. S. at 585).[16] The question thus reserved confronts us here.

The court below appears to have decided the present case in reliance upon *Cullings* v. *Goetz,* 256 N. Y. 287, 290, holding that "Liability in tort is an incident to occupation or control." While that may be the local rule in New York, we do not think that it necessarily controls this case. From the decisions of this Court it seems clear that petitioner's right to recover depends on maritime law and not on New York law. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 88; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 243; *Intagliata* v. *Shipowners & Merchants Towboat Co.,* 26 Cal. 2d 365. A right sanctioned by the maritime law may be enforced in the state courts but nothing gives the complaining party "an election to de-

[16] It appears that there as here the injury resulted from the failure to repair defects in the vessel (in the *Brady* case a ladder) and that the agent, exactly as here, was exclusively responsible for the maintenance, supply and repair of the vessel. It did not appear whether or not the defects were discoverable by reasonable care in inspecting the vessel.

termine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." *Chelentic* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384; *Colonna Shipyard* v. *Bland*, 150 Va. 349, 358. If, as appears, this case is here as one of first impression under the law maritime, this Court may, as in other cases governed by federal law, resort to the customary materials of decision in fashioning a rule.[17]

An analogous situation is found in the case of managing agents who, while having neither possession nor physical control of property, have entire charge of its operation so as to be exclusively responsible for its maintenance. Such agents, known as "real estate management companies", have an implied license to enter and exercise the limited control necessary to make inspections and repairs. Their liability has been summarized in Section 387 of the American Law Institute, *Restatement of the Law of Torts*, as follows:

> An independent contractor or servant to whom the owner or possessor of land turns over the entire charge thereof is subject to the same liability for harm caused to others within or outside the land by his failure to exercise reasonable care to main-

[17] Compare *Board of Commissioners* v. *United States*, 308 U. S. 343, 349–351; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367.

> tain the land in safe repair as though he were the possessor of the land.

And see Restatement, *Agency*, Section 354, Comments a, c, and d; 1 Mechem, *Agency* (2d ed., 1914), pp. 1086–1092.

The rationale of the rule is plain and would appear to be equally applicable here. If the agent binds himself by contract exclusively to inspect, maintain and repair the property, he creates the risk that his failure to perform his obligation will cause injury to innocent third parties. Consequently, the agent is under a duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent. *Dahms* v. *General Elevator Co.*, 214 Cal. 733; *Van Winkle* v. *American Steam Boiler Ins. Co.*, 52 N. J. L. 240; *Hudson* v. *Moonier*, 102 F. 2d 96, 99 (C. C. A. 8); *Murray* v. *Cowherd*, 148 Ky. 591. Restatement, *Torts*, Sections 404 and 395. See *Osborne* v. *Morgan*, 130 Mass. 102, a decision by Mr. Justice Gray, then Chief Justice of Massachusetts. Cf. 2 Am. Jur. *Agency*, Section 333, p. 262. We perceive no material difference between the duties of such an agent ashore and those of respondent here and believe that the same principles of law should govern questions of liability.[18]

[18] See *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.); *Pedersen* v. *Stockard S. S. Corp.*, 268 App. Div. 992 (2d Dept.); *Pipitone* v. *Standard Fruit & S. S. Co.*, 270 App. Div. 844 (2d Dept.).

CONCLUSION

It is respectfully submitted that this Court should reject the contention that the general agent is the owner in possession of the vessel and the principal of the vessel's master and crew.

GEORGE T. WASHINGTON,
Acting Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

J. FRANK STALEY,
JAMES C. WILSON,
Special Assistants to the Attorney General.

PAUL A. SWEENEY,
LEAVENWORTH COLBY,
Attorneys.

MARCH 1947

APPENDIX

UNITED STATES MARITIME COMMISSION
WASHINGTON 25, D. C.

MARCH 24, 1947.

The Honorable GEORGE T. WASHINGTON,
Acting Solicitor General, Department of Justice, Washington 25, D. C.

SIR: This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc.*, et al. for a more specific statement of the views of the Maritime Commission in respect of the responsibility of general agents for the maintenance and repair of the vessels assigned to them.

The provisions of the General Agency Agreement and the Maintenance and Repair Regulations render unsound the contention of the respondent that War Shipping Administration bore the responsibility of inspecting the boom and determining the need for its repair or replacement because at the time of the injury to the appellant the vessel actually was undergoing repairs exceeding $29,000. That contention is not well founded for two reasons. First, because the determination of the maintenance repairs necessary was at all times the responsibility of the General Agent, whatever the cost of such repairs might be. Second, because the replacement or repair of a boom is an item involving less than

$10,000, and, therefore, if required, might have been accomplished by the General Agent during some voyage repair period prior to the one during which the accident occurred. Indeed, the General Agency Agreement and the Maintenance and Repair Regulations clearly establish that if the boom was defective it was the responsibility of the General Agent to have detected the defective boom and to have either remedied the defect itself, if within its ten thousand dollar authority, or to have advised War Shipping Administration of the necessity for such repair.

The position taken by the respondent general agent, if it should be adopted by the Supreme Court and reflected in its opinion, would have manifestly harmful consequences upon the settlement of the obligations of General Agents vis-a-vis War Shipping Administration—United States Maritime Commission. Moreover, the testimony of an employee of the New York office of the Maintenance and Repair Division of War Shipping Administration offered by the respondent (R. 168–183) does not correctly reflect the official position of this agency. There follows a discussion of the reasons for our position on this matter of the Agent's responsibility for repairs.

The respondent General Agent took the position in its requests to charge at the trial (R. 357–358) and reiterates in substance in its brief that:

> 13. The obligation to the United States of the defendants under the General Agency Agreement with respect to inspection of the vessel went no further under the evidence in this case than to receive information from the ship's officers as to

those parts of the vessel which needed repair, to verify such information, and to transmit said information to the United States of America.

* * * * *

15. These defendants as general agents had no obligation with respect to repairs of the vessel other than to arrange with some independent contractor to make said repairs when they were under $10,000 and the only repairs with respect to which such an obligation arose were those which were disclosed to the agents by the ship's officers.

16. There is nothing in the General Agency Agreement or regulations which obligated the defendants to make an independent inspection of the vessel to discover any defects which may have been overlooked by the officers of the vessel and omitted from the requisitions for repairs prepared by the officers.

The General Agency Agreement (GAA–4/4/42) between Thor Eckert & Co. and WSA provided in Article 3A that "to the best of its ability, the General Agent shall for the account of the United States: (R. 363) (c) equip, victual, supply and *maintain* the vessel, subject to such directions, orders, regulations and method of supervision and inspection as the United States may from time to time prescribe."

This clause is further amplified by Article 14 (R. 374) in which it was agreed that:

> The General Agent shall, unless otherwise instructed, *subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by*

the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, *as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition.* The General Agent shall exercise reasonable diligence in making *inspections and obtaining information with respect to the state of repair and condition* of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

The applicable "regulations, instructions or methods of supervision or inspection * * * required * * * by the United States" which were in effect at the time of the injury to the appellant (January 27, 1944) were, as follows: Maintenance and Repair Regulations No. 1 (Revised), effective August 20, 1942, (Plaintiff's Exhibit 8 (R. 383–388)) and Maintenance and Repair Regulations No. 3, effective November 15, 1943 (Excerpts from Plaintiff's Exhibit 6, p. 75). Maintenance and Repair Regulation 1 (Revised) provided in part, as follows (R. 385–386):

2. Repairs to be Ordered by General Agents:

In instances where vessels owned by, or under bareboat charter to, the United States and assigned to General Agents

under Service Agreements with the War Shipping Administration, require repairs (other than structural changes, arming, degaussing, defensing and installation of convoy operating measures) involving the expenditures of not more than $10,000.00 in respect to any one voyage, *the General Agents shall arrange for and order the performance of such repairs without prior written approval of the local manager, Maintenance and Repair Division.* However, General Agents shall promptly notify, and obtain written approval from, the local manager, Maintenance and Repair Division whenever it becomes apparent that actual expenditures will exceed the prescribed limitation of $10,000.00.

Subject to the foregoing, General Agents shall:

(a) *Determine the repairs necessary:*

* * * * *

(c) *Arrange* with the Local Manager for dry-docking and other surveys, and *for inspectors to view the work when the cost of repairs may exceed the prescribed limit:*

(d) Prepare and submit specifications in sufficient detail to describe fully the work to be performed, forwarding a copy to the Local Manager. Specifications must show the classification of the work, such as hull, engine, Steward's Department, insurance and improvements.

(e) Place in hand and award contracts for repairs.

(f) *Supervise to completion, irrespective of the amount to be expended,* all maintenance and insurance repairs including the requirements of the Classification Society and Bureau of Marine Inspection and

Navigation, and approved changes and improvements;

(g) Obtain completion certificates, signed by a representative of the General Agent, the Master or Chief Officer, and Chief Engineer, showing that the repairs have been completed.

* * * * * *

Section 3 of this Regulation provides in part as follows (R. 387–388):

Repairs to be ordered by the Maintenance and Repair Division.

Specifications are to be prepared, and contracts awarded, by the Maintenance and Repair Division, in accordance with basic (Master) contracts, or subject to the terms of a basic contract to be executed by the contractor by whom the repairs are to be made, in all instances involving the following categories:

(a) Repairs to vessels owned by, or under bareboat charter to, the United States and assigned to General Agents under Service Agreements with the War Shipping Administration, involving the expenditure of more than $10,000.00 in respect to any one voyage, *except in an instance where the General Agents arrange for and order the performance of such repairs on the basis of estimates indicating that their cost will not exceed $10,000.00 and it later develops that the actual expenditures exceed that limitation.*

Maintenance and Repair Regulations No. 3 provided in part as follows (Excerpts from Plaintiff's Exhibit No. 6, p. 75):

Part 2—Authorization for Future Awards of Work.

(a) In the future, General Agents shall award work subject to the provisions of Maintenance and Repair Regulations No. 1 (Revised) as amended by Supplement No. 1 thereto. If the holder of a Master contract is available to perform the work, such work must be awarded to such contractor subject to the terms of the Master contract. *The amount of work which a General Agent may award to a holder of a Master* (WARSHIPREP) *Contract without prior approval of the Division of Maintenance and Repair shall not exceed* $10,000 *in respect to any one voyage.* If no such holder of a Master Contract is available to perform the work, General Agents shall award the repairs on a Lump Sum (i. e. fixed price) basis on Form SMALREP attached hereto; work may be awarded by General Agents on a Lump Sum basis without prior approval of the Maintenance and Repair Division on Form SMALREP *only* in amounts not in excess of $1,000 to any one contractor. *Repairs of a separate and distinct character* (such as—radio repairs, compass repairs and adjustments, servicing of refrigeration machinery, etc.) *may be awarded under Form SMALREP, and subject to the limitations thereto, to various contractors specializing in the particular work necessary.* The aggregate of all contracts awarded by the General Agent will in no case exceed $10,000 in respect to any one voyage.

(b) *The attention of General Agents is directed to the provisions of the Service Agreement* (Form G, A. A.) *under which procuring of repairs, to the extent author-*

> *ized, is the responsibility of the General Agent.* Under the prescribed Lump Sum form of contract the price, agreed upon at the time of the award and based upon specifications submitted by the General Agent to the repair contractor, will be the amount payable. Any supplementary items due to changes (additions or cancellations) must be covered in separate specifications showing the price agreed upon for the additional work or the credit for work cancelled. In any case, the $1,000 limitation of the contract (SMALREP) must not be exceeded. Care should be taken in the negotiation of the price to be certain that the work is performed at a fair and reasonable amount.

The intention of the above quoted provisions of the General Agency Agreement and the Maintenance and Repair Regulations with which the General Agent respondent agree to comply was to place responsibility on the respondent, Eckert, "to maintain" the vessel; in the exercise of that responsibility it was required to determine the repairs necessary, with full power and authority to do all things necessary or desirable in order to ascertain the same including the power to survey and inspect the vessel; after determining the repairs necessary if the cost, actual or estimated, of such repairs was under $10,000 it had full power and authority to arrange for such repairs without securing any approval from any War Shipping Administration officials; that after determining the repairs necessary if the cost of such repairs was over $10,000 it had the duty of advising the War Shipping Administration's Maintenance and Repair Division of the nature of the repairs required but the preparation of the speci-

fications and the awarding of the contracts was then to be made by the Maintenance and Repair Division; in either event whether the contract was awarded by the agent or by War Shipping Administration's Maintenance and Repair Division, the Agent was required to supervise to completion all maintenance repairs irrespective of the amount involved. Insofar as repairs under $10,000 were concerned, payment for such repairs was also to be made by the General Agent out of the General Agent's Special Bank Account without any clearance by any War Shipping Administration officials. In this connection we might mention that *one* of the main reasons for having the Commission's Maintenance and Repair Division award the contract in the over $10,000 cases was to free the Agent of the responsibility for the payment of these repairs which ofttimes resulted in the expenditure of considerable sums of money. Payment of these sums by the agents would have required much more frequent replenishment of their accounts than was considered desirable.

The foregoing represents the position of the Maritime Commission on this matter and the testimony of any employee of the Maintenance and Repair Division, War Shipping Administration, New York (R. 181–183), to the extent it deviated from this position, can not be considered to be binding as the official position of War Shipping Administration. The Agent's statement of the scope and intent of the War Shipping Administration—Maritime Commission's Regulations and Orders does not properly represent and differs substantially from this Agency's interpretation and construction of its own Regulations

and Orders. We believe that the Court should be afforded the full benefit of this Agency's construction and interpretation with respect to any of the Orders and Regulations which may have bearing on the issues raised in this case.

Respectfully,

(Signed) W. H. Skinner,
WADE H. SKINNER,
General Counsel.

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pp. 2, 3, 4

SUPREME COURT OF THE UNITED STATES

No. 625.—October Term, 1946.

Peter Caldarola, Petitioner, *v.* Gerda Eckert and Thor Eckert, Jr., Partners Doing Business Under the Firm Name of Thor Eckert & Co.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 23, 1947.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The S. S. Everagra is owned by the United States and managed in its behalf by the respondents as General Agents. (For the relevant portions of the contract and for full consideration of it in relation to issues other than those here involved, reference is made to *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707.) On January 27, 1944, the Everagra, docked in the North River, New York City, was being unloaded by a stevedoring concern, the Jarka Company. Jarka did the unloading under a contract with the United States, negotiated through the War Shipping Administration. One of its provisions was that "the Administrator shall furnish and maintain in good working order all" necessary equipment. Caldarola, the petitioner, was an employee of Jarka. In the course of his work on the vessel he was injured. He brought this action in the New York courts against the respondents, claiming that his injury was caused by a defective boom and that they were liable for failing in their duty as Agents to maintain it in sound condition.

The New York Court of Appeals, affirming the Appellate Division in setting aside a verdict for the petitioner, 270 App. Div. 563, held that under New York law the relation which the Agents bore to the vessel did not make them responsible to a third person for its condition. 295

N. Y. 466. Because of claimed conflict in the decisions, particularly between this ruling and *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, we granted certiorari. 329 U. S. 704.

No doubt petitioner could have sued the United States in Admiralty. Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. § 742. He chose not to do so. Presumably to obtain the benefit of trial by jury, he asked for relief from New York. There is no question that the injury of which Caldarola complains is a maritime tort. As such it is suable in the State courts by virtue of § 9 of the Judiciary Act of 1789 which saves "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 76–77. Whether Congress thereby recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether it was concerned only with "saving" to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available, is a question on which the authorities do not speak with clarity. Compare *Waring* v. *Clarke*, 5 How. 441, 460–61; *Taylor* v. *Carryl*, 20 How. 583, 598–99; and 3 Story on the Constitution (1st ed.) 533, n. 3, with *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *The Hamilton*, 207 U. S. 398; *Chelentis* v. *Lukenbach S. S. Co.*, 247 U. S. 372; *C. J. Hendry Co.* v. *Moore*, 318 U. S. 133; and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88–89. In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises. Compare *Douglas* v. *New York, New Haven & Hartford R. Co.*, 279 U. S. 377, and *Testa* v. *Katt*, 330 U. S. —.

The New York Court of Appeals authoritatively determines who is liable, in New York, for such an occurrence

as that of which Caldarola complains. Insofar as the issues in this case exclusively concern New York law, that court had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains. But to the extent that the determination of tort liability in New York is entangled with the construction of the contract between the Agents and the United States, the interpretation of that contract is a matter of federal concern and is not concluded by the meaning which the State court may find in it.

We agree that if, on a fair reading of the contract, the control which the Agents had over the vessel is the kind of control which New York requires as a basis of liability to third persons, the New York courts cannot so read the contract as to deny the right which it recognizes. It is not claimed that an injured party has rights under the agency contract or that it created duties to third persons. *Robins Drydock & Repair Co.* v. *Flint*, 275 U. S. 303. And so the narrow question is whether the Agents were in possession and control of the [redacted]. Everagra. This is the crucial issue, because liability in tort by the Agents for Caldarola's injury would only arise in New York when there is such possession and control of premises on which injury occurs, due to negligence in their maintenance. *Cullings* v. *Goetz*, 256 N. Y. 287. The United States, as *amicus curiae*, submitted what we deem to be conclusive considerations against reading the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel. The consequences, to both the national and international interests of the United States, of such a construction would be too far-reaching to warrant such a forced reading merely in order to have a basis on which to build liability under the [redacted] law of New York. Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments

would needlessly be raised. After all, the question is not whether petitioner may be compensated for his injury. Congress has made provision for that. Petitioner insists, in order to enable him to sue in the courts of New York, that the Agents are to be deemed, as a matter of federal law, owners of the vessel *pro hac vice* and, therefore, as a matter of State law, subject to the duties of such ownership under New York law toward business invitees. We reject this construction.

Our previous decisions do not require it. *Hust* v. *Moore-McCormack Lines, supra*, arose under the Jones Act (Act of March 4, 1915, 38 Stat. 1185, as amended, June 5, 1920, 41 Stat. 1007). We there held that under the Agency contract the Agent was the "employer" of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an "employer." The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States. *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, is likewise remote from the issues decisive of this case. It merely held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the Agent from liability for his own torts. The *Brady* case did not reach the "different question" whether "a cause of action" against the Agent had been established. 317 U. S. at 585. That is the precise question here, and more particularly, whether the contract created a relationship from which, under New York law, liability as to business invitees followed.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 625.—October Term, 1946.

Peter Caldarola, Petitioner,
v.
Gerda Eckert and Thor Eckert, Jr., Partners Doing Business Under the Firm Name of Thor Eckert & Co.

On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 23, 1947.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Murphy concur, dissenting.

For the reasons stated in my separate opinion in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 734, I think that respondents were owners *pro hac vice* of the vessel since the business of managing and operating it was their business. They were, therefore, principals and liable to petitioner, a longshoreman who was injured while working on the deck of the vessel by reason of the breaking of a cargo boom, part of the ship's gear.

The Circuit Court of Appeals for the Second Circuit has reached the same result in a case decided since *Hust* v. *Moore-McCormack Lines*. In *Militano* v. *United States*, 156 F. 2d 599, that court held that the agent under the same form of operating agreement as we have here was owner *pro hac vice*. Swan, J., speaking for the court, said in reference to the *Hust* case, p. 602, "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner pro hac vice in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor."

The Court does not essay to answer that argument; nor does it address itself to the facts which I reviewed in the *Hust* case and which establish that the business of man-

aging and operating the vessel was the business of the agent. It avoids analysis of the actual arrangement by viewing with alarm the consequences to the Government of such a holding as applied in other situations. But we are here concerned with private rights which press for recognition. It is no answer to the legal argument on which those private rights rest that the Government might be inconvenienced if they were recognized. It is plain under this operating agreement that the United States is merely the underwriter of the financial risks of the venture while the private operator performs the managerial functions in the usual way. To call that government operation is to ignore the realities of the relationship. Whatever the consequences in other situations, it is shocking to find private operators getting immunity in this manner from their traditional liability for tort claims.

SUPREME COURT OF THE UNITED STATES

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[June 23, 1947.]

Mr. Justice Rutledge, dissenting.

I agree with respondents' counsel and the Court that *Hust* v. *Moore-McCormack Lines*, [redacted] U. S. 707, does not rule this case. Nevertheless I cannot agree with the Court's view that either New York law or the so-called "agency contract," identical with that involved in the *Hust* case, immunizes respondents from the consequences of their negligence causing petitioner's injury.

The *Hust* case involved the rights of seamen, not of longshoremen.[1] Also it arose under the Jones Act, 46 U. S. C. § 688, whereas here liability is grounded upon maritime tort. And the *Hust* decision rested in part upon the effects of the so-called Clarification Act of 1943, 50 U. S. C. App. § 1291, which has no bearing in this case, since seamen are not involved.

The *Hust* decision flatly rejected the view that the events there in question[2] had been effective to strip the

[1] Congress and the President, in the legislative and executive action taken in connection with the Merchant Marine and pertinent in the *Hust* case, were concerned with the rights of seamen, not primarily or perhaps even incidentally with those of longshoremen.

[2] In the *Hust* case, after noting the disruptive consequences for seamen's long-settled rights flowing from the view that they had been reduced for assertion to the single remedy provided by the Suits in Admiralty Act, we said: "We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequiv-

seaman of his various preexisting remedies, replacing them with the single remedy of suit provided by the Suits in Admiralty Act.[3] 46 U. S. C. § 742. The necessary result was to preserve not merely the seaman's rights under the Jones Act but also his other preexisting ones.[4] For if the conjunction of events put forward in the *Hust* case as having made the Suits in Admiralty Act remedy the only one available to the seaman was thus effective, the Jones Act remedy as well as others was thereby excluded. And if it was not excluded, neither were those others long possessed by seamen.[5] The *Hust* decision was therefore not merely a construction of the Jones Act. That Act was simply a specific fulcrum for turning the broader issue presented.

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ocal command. It is not permissible to find one by implication. *Brady* v. *Roosevelt Co.*, *supra* [317 U. S. 575], at 580. Here the disruption, if it has occurred, has done so only as an implied result of the conjunction of the Suits in Admiralty Act's provisions with the Government's emergency action in taking over the shipping industry for war purposes." 328 U. S. at 722. No such intent, we said, could be found in any action of Congress, or of that body and the President, in exercising their powers to bring the industry under governmental control; or in the Suits in Admiralty Act or the Jones Act as applied to the relation created by the "agency" contract.

[3] See note 2.

[4] Confirmation of the conclusions summarized in note 2, *supra*, was found in the legislative history of the Clarification Act of 1943, 50 U. S. C. App. § 1291, and particularly in the provision for election of remedies given by § 1, as to injuries accruing on or after October 1, 1941, and before March 24, 1943, the Act's effective date. Opinion was expressly reserved as to the effect of that Act concerning injuries occurring after its effective date. 328 U. S. at 727.

[5] In the *Hust* case we said of the argument that the Suits in Admiralty Act remedy had become exclusively available for asserting seamen's rights that, with specified exceptions, "the various rights of seamen, enforceable by various proceedings in admiralty and at law, in state and federal courts, are swept into one hopper, the suit against the Government. . . ." 328 U. S. at 720.

But seamen's rights are not longshoremen's rights and the events combining to present the question concerning seamen's rights in the *Hust* case were not conclusive upon longshoremen's rights. This is true although in some instances longshoremen, through legislation or by virtue of their succession to seamen occasioned by the industry's evolution in some phases of ship and shore duty, have been held entitled to similar protections. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. The question in this case therefore is not one necessarily governed by the same considerations as applied in the cases of seamen covered by the *Hust* decision.

But, as the Court recognizes, it is one of maritime tort, although longshoremen rather than seamen are involved; and is moreover "suable in the state courts by virtue of § 9 of the Judiciary Act of 1789, which saves 'to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.'" Notwithstanding the characterization as maritime tort, the Court skirts the question whether the source of the right is New York law or, on the contrary, is federal law for which New York, pursuant to § 9, merely supplies a means for enforcement. For in either event, it says, "New York's determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of the premises."

From this conclusion I disagree. For, if the liability here is founded in federal law, as creating the maritime tort, then New York law has nothing to do with creating or nullifying the substantive right. Its sole function is to supply the remedy commanded by § 9 of the Judiciary Act. *Testa* v. *Katt*, 330 U. S. —. And in my judgment the liability here, since it arises from a maritime tort,

is a creature of federal law in its entirety, not of state law.* I therefore do not agree that any substantive issues in the case "exclusively concern New York law" or that in any respect that state's Court of Appeals "had the final say in holding that one in the relation of respondents to the petitioner is not liable for the tort of which the latter complains." I do not understand how the Court can leave open the question whether New York law has a hand in creating the right sued on or one only in supplying a forum and remedy, and at the same time can rely on New York law as having any part in creating the right or nullifying it, as it seems to do. The result does not simply entangle state law with federal law in the substantive phase of the case. It entangles hypothetically applicable state law in one phase with federal law in another.

Regarding the case, as I do, as being controlled in its substantive aspect altogether by federal law, I do not think that law requires or should permit the result the Court reaches. Regardless of whether the so-called "agency" contract makes the operating company an

* 28 U. S. C. § 371, derived from § 9 of the Judiciary Act of 1789, is a recognition by Congress that the states may exercise whatever jurisdiction the common law had concurrently with admiralty. See *Waring* v. *Clarke*, 5 How. 441, 460–461. However, since "It is not a remedy in the common-law courts, which is saved, but a common-law remedy," *The Moses Taylor*, 4 Wall. 411, 431, it has been held that where suit is brought under the saving clause the right to be enforced is that "recognized by the law of the sea." *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384. "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court." *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259. The commentators recognize this to be the rule now, 1 Benedict on Admiralty (6th ed.) 53–55; Steinberg, Maritime Cases in Common-law Courts (1925) 3 Tex. L. Rev. 246; Mole and Wilson, A Study of Comparative Negligence (1932) 27 Corn. L. Q. 333, 353–355, though the matter seems not to have been decided prior to the *Chelentis* case. Cf. *The Hamilton*, 207 U. S. 398, 404.

"agent," an "owner pro hac vice," or technically something else in relation to the United States, the federal maritime law in my opinion well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use.[7] More especially should such a rule apply when the person so undertaking is the only one constantly on board to observe the creation of hazardous risks in the vessel's daily routines and, in addition, has such a degree of control over their creation as the "agent" did here.

But, in any event, the same result should be reached on the basis of construction of the contract. Whether this is put upon the ground stated in the opinion of MR. JUSTICE DOUGLAS, that the "agent" became owner *pro hac vice*, or in the view of the contract taken in the *Hust* case, with reference to application of the Jones Act, is largely immaterial, perhaps only a matter of words.[8]

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[7] "One who does an act or carries on an activity upon land on behalf of the possessor thereof, is subject to the same liability, and enjoys the same immunity from liability, for bodily harm caused thereby to others within and outside the land as though he were the possessor of the land." Restatement, Torts, § 383.

"An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take." Restatement, Agency, § 355.

[8] In that case, assuming that the agreement made Hust, the injured seaman, an employee of the United States for purposes of ultimate control, in spite of the meticulous character of the differences between it and the Maritime Commission's standard contract, we said: "But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for such injuries as he incurred. This case, like *National Labor Relations Board* v. *Hearst Publications*, 322 U. S.

That view, incorporating the rule of the *Hearst* case,[9] we have only recently extended to apply in cases of coverage of the Social Security Act and the Fair Labor Standards Act. *United States* v. *Silk*, 331 U. S. —; *Harrison* v. *Greyvan Lines, id.*; *Rutherford Food Corp.* v. *McComb*, 331 U. S. —. While the liability here is not legislative in origin, nevertheless as in the *Hust* case, application of the common-law "control" test to defeat the longshoreman's remedy under the state procedure, as provided by § 9 of the Judiciary Act of 1789, cannot "be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life.'" 328 U. S. at 725.

Finally, in my opinion, the terms of the agreement in its provisions for indemnity confirm the conclusion that liability of the "agent" in such a case as this was contemplated. Not only is there broad indemnity "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," with specified exceptions not covering such liabilities as are now in question. The indemnity also expressly provided:

> "To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss or personal effects, maintenance, cure,

111, involves something more than mere application to the facts of the common-law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee." 328 U. S. at 724.

[9] *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111.

> vacation allowances, *damages or compensation for death or personal injury or illness,* and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements . . ." (Emphasis added.)

as well as for payments made to pension funds and for social security taxes. This clause specifically contemplated that the "agent" should be responsible for paying claims not only for maintenance and cure but also for "damages or compensation for death or personal injury or illness," and should be indemnified for such payment. A narrow construction, of course, would limit the provisions for payment and indemnity to payments made without resort to suit. On the other hand, even a literal interpretation would cover payments made by the "agent" upon judgments recovered against it on claims of the character specified. I know of no good reason why the narrow view should be accepted or why the Government by its contract should desire to uproot seamen and others, including longshoremen insofar as they have acquired seamen's rights aboard ship, from their normally applicable remedies, in the absence of either explicit statutory command or express contractual provision to that effect. Moreover, in view of the scope of the indemnity provided, I see no possible harm that could be inflicted on the "agent" from interpreting the contract so as to allow the normally applicable remedies to apply.

Accordingly, I would reverse the judgment of the Court of Appeals.